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When Justice Fails: Indemnification for Unjust Conviction

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ARTICLES

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In thirty-six states in our nation, people who have been convicted and incarcerated for crimes they did not commit are precluded from recovering damages in a court of law by the inflexibility of tort law and civil rights doctrine—despite later exoneration.[1] In those jurisdictions, indemnification legislation should be enacted. The necessary law is simple, clear and effective. The remedy is not expensive and does not require creation of new bureaucratic agencies. Indeed, indemnification legislation has been tested over time in more than a dozen states.[2]

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1. The following states have an indemnification statute. See Cal Penal Code § 4900-4906 (1982) (enacted 1941) (California); Ill Rev Stat Ch 705, § 505/8 (1992) (enacted 1945) (Illinois); Iowa Code Ann § 663A.1 (West 1998) (enacted 1997) (Iowa); 14 Me Rev Stat Ann § 8241 (1998) (enacted 1993) (Maine); Md Code 1957 art 78(a) § 16(A) (1998) (enacted 1963) (Maryland); NH Rev Stat Ann § 541-B:14 (1998) (enacted 1977) (New Hampshire); NJ Stat Ann §§ 52:4C-1-4C-6 (West 1999) (New Jersey); NY Ct Claims Act § 8-b (1989) (enacted 1984); NC Gen Stat § 148-82 (1998) (enacted 1947) (North Carolina); Ohio Rev Code Ann §§ 2305.02, 2743.48 (enacted 1986) (Ohio);Tenn Code Ann § 9-8-108 (a)(7)(1998) (enacted 1955) (Tennessee); Tex Rev Civ Stat Ann § 103.001 (Vernon 1997) (enacted 1965) (Texas); W Va Code § 14-2-13(a)(1998) (enacted 1987) (West Virginia); and Wis Stat § 775.05 (1993) (enacted 1943) (Wisconsin). There is also a Federal compensation statute. See 28 USC §§ 1495, 2513 (1998) (enacted 1948); DC § 1221-1225 (1998) (enacted 1981) (District of Columbia).

2. In many of the states having indemnification statutes, existing codes need revision to expunge archaic restrictions and to increase potential awards. See section IV.

Most importantly, a legislative remedy is the only reliable and fair response to the inevitable mistakes that occur as a byproduct of the operation of a criminal justice system as large as ours.[3] The state whose actions have put individuals in prison for crimes they did not commit owes a debt to those who through no fault of their own have lost years and opportunity. The debt should be recognized and paid.

Although scholars have been urging the passage of such legislation, with little success, for at least sixty years, progress should proceed more rapidly now. Until recently, the assertion that innocent people are routinely and frequently convicted was supported only by anecdotal witness interviews and historical research.[4] Critics debated the validity of methodology, inferences and conclusions.[5] Today recent developments in the forensic sciences—particularly in DNA profiling—prove, beyond a shadow of a doubt, that mistakes occur and that the innocent are convicted everywhere, in sizable numbers, sometimes as a result of negligence and other times simply by accident, mistake or serendipity.[6] Certainty compels action.

The first section of this article reviews the evidence, both historical and contemporary, documenting the existence and frequency of wrongful convictions. The next dissects an actual case to illustrate how an innocent person can be convicted and why, once the error has been corrected and the conviction is vacated, that person generally has no legal action for damages in the absence of indemnification legislation. The third section argues that society has a moral obligation to assist the wrongfully convicted; that indemnification legislation is a better approach than reliance on "moral obligation" bills; and that enacting legislation is possible—just as it was possible to pass victims' compensation laws in every state. The fourth part compares various indemnification statutes to urge that antiquated restrictions be lifted and that potential awards be increased.

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3. On June 30, 1998, 1,277,866 prisoners were under federal or state jurisdiction. See US Dept of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/prisons.htm (Aug 3, 1998).

4. See Edwin M. Borchard, *Convicting the Innocent: Errors of Criminal Justice*, (1932) [hereinafter *Convicting The Innocent*] Judge Jerome Frank and Barbara Frank, *Not Guilty*, (Doubleday 1957) [hereinafter Not Guilty]; Michael L. Radelet, *In Spite Of Innocence: Erroneous Convictions in Capital Cases*, (1992) [hereinafter *In Spite Of Innocence*].

5. See Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan L Rev 121 (1988). Markman and Cassell contend that Radelet and Bedau fail to mount convincing proof that all 400 stories contained in their treatise describe truly innocent individuals. They quarrel with the quantum of proof in some cases, the sources and the standard used in others. Radelet and Bedau respond to the critique in Michael L. Radelet and Hugo Adam Bedau, *The Myth of Infallibility : A Reply to Markman and Cassell*, 41 Stan L Rev 161 (1988).

6. See Edward Conners, et al, *Convicted By Juries, Exonerated by Science: Case Studies in the use of DNA evidence to Establish Innocence after Trial*, US Dept of Justice, National Institute of Justice (1986) [hereinafter NIJ or NIJ Report].

I. PROOF THAT THE INNOCENT ARE CONVICTED

In June of 1996, the National Institute of Justice (NIJ) published a report documenting twenty-eight wrongful convictions for sexual assault and murder.[7] The cases were tried in fourteen state courts and the District of Columbia between 1979 and 1991. The convicted men served an average of almost seven years before being released from prison.

The NIJ report is significant for a number of reasons. First, it presents irrefutable proof that innocent people are convicted. Second, the study is a powerful indictment of the reliability of eyewitness identification, especially when identification procedures are police-arranged. Third, it provides some basis for estimating the frequency of wrongful convictions. Fourth, it highlights the importance of collecting and preserving crime scene evidence. Finally it illustrates the inability of the direct appeal process to correct factual errors.

Advocates were able to establish the innocence of the wrongly convicted men whose stories are collected in the NIJ report because in each case the perpetrator had left biological evidence (usually semen) at the scene of the crime, which was collected (from underwear or bodies) and preserved post-conviction so that it was available to be compared to the convicted persons' DNA later on. In each, post-conviction DNA comparison proved to a scientific certainty that the convicted persons were not guilty, even though in twenty-two of the twenty-eight cases the convictions had been affirmed by appellate courts.

Importantly, in twenty-three of the twenty-eight cases, the accused men were positively—but incorrectly—identified by the victims as the perpetrators of the crimes. Since there is no reason to assume that eyewitnesses perceive, recall or testify more accurately in cases other than sexual assaults, it is safe to assume that eyewitness mistakes occur in all kinds of cases at about the same frequency. Because eyewitness testimony is the key evidence in many criminal prosecutions, some percentage of all convictions based on eyewitness testimony are wrong.

> Every year since 1989, in about 25 percent of the sexual assault cases referred to the FBI . . . [pre-trial during the investigation of a criminal case], where results could be obtained. . . the primary suspect has been excluded by forensic DNA testing. Specifically, FBI officials report that out of roughly 10,000 sexual assault cases since 1989, about 2,000 tests have been inconclusive (usually insufficient high molecular weight DNA to do testing), about two thousand have excluded the primary suspect and about six thousand have included or "matched" the primary suspect.[8]

In other words, in the last seven years, one in four primary suspects in sexual assault cases, whose blood was forwarded to the FBI for testing, have been excluded. Although it is impossible to know for certain whether this 25 percent

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7. See id.

8. Quoted from "Commentary by Peter Neufeld, Esq. and Barry Scheck," of the Innocence Project, contained in the NIJ Report at xxviii.

would have been convicted after trial without the DNA testing, the odds of a wrongful conviction in those cases seem fairly high.[9]

What the NIJ report conclusively proves, scholars have been arguing for years.[10] In 1932, Edwin M. Borchard published *Convicting the Innocent*—a collection of sixty-five criminal prosecutions of people Borchard believed to be "completely innocent"—advocating the passage of indemnification legislation.[11] In action-packed sketches filled with details of life in the early part of the 20th century, Borchard tells the stories of farmers, taxi-drivers, "literary loafers" as well as drunks and ne'er-do-wells—all wrongfully convicted. They were convicted in federal and state courts, in rural areas and in big cities, by judges and by juries. Borchard's portraits convince us that anyone could be both wrongly accused and unable to prove innocence.

Borchard attributed the erroneous convictions to a variety of errors, including: mistaken eyewitness identification; witness perjury; the damaging effect of a previous criminal conviction; the use of unreliable coerced confessions; irresponsible "expert" testimony; and poverty of the accused preventing the mounting of an adequate defense.[12] Although he made suggestions for improvements in the administration of the criminal justice system to reduce the occurrence of error, it is impossible to read these compelling tales without concluding that errors cannot be entirely eliminated from the process of criminal adjudication and that mistakes will inevitably occur. Ultimately, serendipity was responsible for many of the false convictions and serendipity accounted for the discovery of many of the mistakes.

Take, for example, the case of J. B. Brown who was convicted and sentenced to hang for the murder of a railroad worker, Harry E. Wesson.[13] Mr. Wesson's body was discovered as it lay in the shop yard of the Florida Southern Railway, in the early morning hours of October 17, 1901. Mr. Wesson had been shot in the head at point blank range. There were no witnesses, the weapon was never recovered, and there were a number of equally likely suspects. The criminal investigation focused on J.B. Brown when it was imagined that he had been previously fired from the railroad and that information provided by Wesson had contributed to the dismissal. Although there was no direct evidence linking J.B. Brown to the murder, and although he steadfastly maintained his innocence, bits of circumstantial evidence combined with perjured testimony supplied by cellmates convinced harried police, under pressure to solve the crime, to indict Mr.

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9. Even assuming, conservatively, half the normal conviction rate (and state conviction rates for felony sexual assault cases average about 62 percent), hundreds of people, who have been exonerated by FBI DNA testing, would have otherwise been convicted. Commentary by Neufeld & Scheck, at xxix (cited in note 8).

10. The NIJ report takes no position on what should be done to compensate those who have been wrongly convicted or to reform the criminal justice system—other than Attorney General Janet Reno's introductory message which exhorts the scientific community to create standards for the collection and preservation of DNA evidence. See NIJ Report at iii.

11. See *Convicting The Innocent*, (cited in note 4)

12. See id at xiii-xxiv.

13. See id at 33-39.

Brown and later persuaded jurors to convict him. Borchard reports that a "specially built gallows" was constructed for the hanging. "Brown was lead to the gallows, and the rope adjusted about his neck."[14] But before the trap door could open, the warrant of execution was read aloud to those present. Somehow names had been transposed and the formal document ordered the execution of the foreman of the jury that had sentenced Brown to death. Brown's life was saved and his death sentence commuted to life in prison, so that when the real killer confessed twelve years later, Brown was still alive to be released from prison as an elderly and disabled man. Sixteen years after his release, the Florida Legislature decided to award Mr. Brown $2,492 as compensation for the years he spent in prison.

Not content to rely on sympathy to motivate the public to enact indemnification legislation, Borchard appealed to national pride as well. Many of the European and South American countries had already enacted efficient and fair indemnification plans,[15] in stark contrast to the United States where, by 1932, only California[16], North Dakota[17] and Wisconsin[18] had indemnification statutes.

Borchard no doubt anticipated that within a few short years of his book's publication, states across the country would enact the legislation he favored. He was wrong. Sixty-six years later, in 1998, only fourteen states, the District of Columbia and the federal government have such statutes.[19]

Although his goal was not achieved, Borchard's work was not forgotten. In fact, his themes were reiterated and his writing style emulated. Twenty-five years after the publication of *Convicting the Innocent*, Jerome Frank, a Judge of the United States Court of Appeals in the Second Circuit and advisor to Franklin D. Roosevelt, and his daughter Barbara, similarly described the fate of an entirely different set of individuals—also wrongfully convicted.[20]

The Franks spend more time than did Borchard struggling to account for the errors that caused the erroneous convictions and to devise solutions to prevent recurrence. They expose the dangers of prosecutorial failure to turn over exculpatory material to the defense and the pernicious effects of the prosecutorial tendency to indict lying witnesses for perjury more frequently when the accused is acquitted than where the witness's lies have caused a wrongful conviction. They articulate the dangers of the police tendency to "rush to judgement":

> See what sometimes happens: A bank has been robbed, its cashier murdered. A bystander reports to the police that he saw William Jones commit the murder. Having thus found a suspect, the police sedulously run down all clues that seem to incriminate William Jones. They piece together these clues and jump to the

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14. See id at 37.

15. See id at 385-387.

16. See 1913 Cal Stat ch 165, p 245 (current version at Cal Pen Code §§ 4900-4906 (1941)).

17. See 1917 ND Laws Ch 172, p 1519 (repealed 1965).

18. See 1913 Wis Stat Ch 189 (current version at Wis Stat § 775.05 (1943)).

19. See note 1 (current list of indemnification statutes).

20. See *Not Guilty* (cited in note 4). Barbara Frank completed *Not Guilty* after her father's death and published it posthumously.

> conclusion that he is their man. They overlook other clues that might exculpate Jones or inculpate someone else. They brush aside facts inconsistent with their theory of Jones's guilt. In this they are not dishonest. For here pride and prejudice operate: Pride in their theory is buttressed by prejudice against any other.[21]

Almost two generations later, in 1992, Michael L. Radelet, Hugo Adam Bedau, and Constance E. Putnam, in the documentary style shared by Borchard and the Franks, describe four hundred cases of wrongful convictions, including a staggering twenty-three cases of wrongful execution.[22] Convinced that changes in the criminal justice system will not eliminate miscarriages of justice, the authors spend little time discussing potential improvements. "Most errors caught in time are corrected not thanks to the system, but in spite of the system."[23] The authors, like the Franks forty years earlier, press fervently for abolition of the death penalty, marshaling evidence to illustrate that the United States is routinely convicting, and occasionally executing, entirely innocent persons in the name of justice.

Although the dramatic and emotional stories failed to abolish the death penalty or to widely enact indemnification legislation, the literature convinced lawyers, writers and sociologists interested in the criminal justice system that erroneous convictions occur; involved scholars in debates over why they occurred; and prompted interest in remedies.[24]

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21. Id at 66.

22. See *In Spite of Innocence*, at 8 n7 (cited in note 4).

23. Id at 278.

24. Four other books in English have been published on the subject of wrongful convictions. See Ruth Brandon & Christie Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences*(Archon 1973); Earl Stanley Gardner, *The Court of Last Resort*(1952); Edward Radin, *The Innocents*, (1964); Martin Yant, *Presumed Guilty: When Innocent People are Wrongly Convicted* (Prometheus 1991). Numerous articles focus on causes of wrongful convictions. See, for example, Bennet L. Gershman, *The New Prosecutors*, 53 U Pitt L Rev 393, 451-54 (1992) (examples of prosecutorial misconduct resulting in miscarriages of justice); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent*, 49 Rutgers L Rev 1317 (1997) [hereinafter *Meaningless Acquittals*]; Samual R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 Buff L Rev 469 (1996); James McCloskey, *Convicting the Innocent*, Crim Just Ethics 2 (Winter/Spring 1989) (James McCloskey is the Director of the Centurion Ministries, Inc. of Princeton New Jersey, which has successfully won freedom for dozens of innocent and unjustly convicted individuals across the country); Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions 1965-1988*, 18 NYU Rev L & Social Change 807 (1991) (reporting results of a study conducted by the New York State Defender's Association of wrongful convictions in New York); Steven Wisotsky, *Miscarriages of Justice: Their Causes and Cures*, 9 St Thomas L Rev 547 (1997). Most recently Jack King, *The Ordeal of Guy Paul Morin: Canada Copes with Systemic Injustice,* The Champion, 8 (August 1988). Still others focus on compensation for the wrongly convicted. See, for example, James Cleary, *When the Prisoner is Innocent*, 14 Hum Rts 42 (Spring 1987) (a brief overview of existing wrongful compensation statutes, their benefits, and their deficiencies); Richard C. Donnelly, *Unconvicting the Innocent*, 6 Vand L Rev 20 (1952) (barriers to establishing innocence); Joseph H. King, Jr., *Compensation of Persons Erroneously Confined by the State*, 118 U Pa L Rev 1091 (1970) (the author supports compensation for those who have been erroneously convicted or civilly confined and discusses possible legal theories

Even prior to publication of the NIJ report, sociologists were beginning to accept the premise that wrongful convictions happen and to calculate frequency.[25] Huff, Rattner and Sagarin surveyed participants in the Ohio criminal justice system—judges, prosecutors, public defenders, sheriffs, chiefs of police, and state attorneys general, and asked each to estimate how often they believe that wrongful convictions happen.[26] Respondents estimated that 99.5 percent of all guilty verdicts in felony cases are correct. As the authors point out, if those beliefs are true, juries return a high number of unreliable verdicts every year. Assuming that 70 percent of people charged with felony crimes are convicted[27] and that 99.5 percent of the convictions are correct, Huff, Rattner and Sagarin conclude that in 1993, when 2,848,400 people were arrested, 10,000 people were erroneously convicted.[28]

The Huff, Rattner and Sagarin numbers—high as they seem—probably underestimate the number of erroneous convictions. "These figures represent convictions of innocent people following trial."[29] Many more innocent people may enter pleas of guilty when confronted with the risk of conviction after a sentence and the potential of a longer sentence.[30] For example, David Vasquez, whose story is included in the NIJ report, pleaded guilty to second-degree homicide and burglary in order to avoid the possibility of the death sentence after trial.[31] The police claimed that Mr. Vasquez, who is mentally disabled, had made inculpatory statements during a police interrogation. Post-conviction DNA tests proved that another individual had committed the murder. Mr. Vasquez was released and pardoned.[32]

The NIJ report confirmed what many participants in the criminal justice system already believed—that people are wrongfully convicted. The work of Borchard, the Franks, Radelet and Bedau—carefully reconstructing trials, describing

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upon which damage awards could be predicated); and David S. Kasdan, *A Uniform Approach to New York State Liability for Wrongful Imprisonment: A Statutory Model*, 49 Albany L Rev 201 (1985).

25. C. Ronald Huff, et al, *Convicted but Innocent: Wrongful Convictions and Public Policy* 59 (Sage 1996), [hereinafter *Convicted But Innocent*].

26. Huff, et al chose Ohio for their survey because it was the seventh most populous state, contained a mix of urban, rural and suburban areas, and has a fairly representative criminal justice system. *Convicted But Innocent* at 57-59. According to the FBI's Uniform Crime Reports, the state has an average rate of felonies, and its prisons have commitment rates similar to those of prisons in other large states. *Convicted But Innocent* at 58. Additionally two celebrated cases of wrongful conviction and later exoneration occurred in Ohio. Huff mentions, without a citation, the case of William Jackson who was exonerated after five years in jail and that of Bradley Charles Cox, reported in *Cox v State of Ohio*, 552 NE 2d 970 (Ct Claims Ohio 1988).

27. Bureau of Justice Statistics, US Dept of Justice, *Sourcebook of Criminal Justice Statistics* 497 (1995). Ninety-two percent of convictions occurring within one year of arrest were obtained through a guilty plea, http://www.ojp.usdoj.gov/bjs/cases.htm (Oct 24, 1998).

28. See *Convicted But Innocent*, at 374 (cited in note 25).

29. Daniel Givelber, *Meaningless Acquittals*, at 1343 (cited in note 24).

30. Id.

31. In some circumstances a defendant will be permitted to plead guilty without admitting the facts of the crime. See, for example, *North Carolina v Alford*, 400 US 25 (1970). See especially note 164 and the accompanying text.

32. See NIJ at 75-76 (cited in note 6).

the community and the characters involved; highlighting the bizarre twists of fate which resulted in the many erroneous convictions and subsequent exonerations—prepared the public to accept the NIJ conclusions. The early studies kept interest in the issue of wrongful convictions alive, even as the courts grew less concerned with innocence.[33] They questioned whether police procedures, sanctioned as consistent with due process, were effectively distinguishing between guilty and innocent suspects. They suggested that the factors which contribute to wrongful convictions tend to be mistakes of fact (such as mistaken eyewitness identification, incorrect police hypothesis or careless police work, witness perjury, and false confessions), rather than errors applying the law and, as a result, improvements in criminal procedure laws and police investigatory techniques will at best reduce the frequency of wrongful convictions, not eliminate them altogether.[34] Finally, they reminded the public of its moral responsibility to those who have been wrongfully convicted.

Undoubtedly the powerful confirmation of DNA profiling will stimulate renewed interest in improving the criminal justice system's ability to convict the guilty and free the innocent.[35] It should also silence skeptics who might insist that the innocent are never convicted and rededicate us to achieving Borchard's goal—indemnification for those who have been wrongfully convicted.

Even though he was innocent, Marion Coakley was convicted of rape and robbery in 1984. As post-conviction serological testing would later prove, the verdict was incorrect. Mr. Coakley was not the perpetrator. The factors which Borchard, the Franks and Radelet and Bedau indict as consistently contributing to wrongful convictions—mistaken eyewitness identification, narrowly focused police investigation, prosecutorial failure to disclose exculpatory information—converged in this case. A close look at the crime, the police investigation, and the trial illustrates concretely how an innocent person can be found guilty, why the errors that lead to conviction will recur in other prosecutions, and why such a person would have no remedy for the harm suffered in the absence of an indemnification statute.

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33. According to the Supreme Court, claims of actual innocence are an insufficient ground upon which to base a claim for federal habeas relief. A claim of innocence, unaccompanied by a claim of constitutional trial error, must be so compelling as to make a sentence of execution "constitutionally intolerable," *Schlup v Delo*, 513 US 298, 317 (1995).

34. See *In Spite Of Innocence* at 287 (cited in note 25).

35. See generally, *Meaningless Acquittals*, (cited in note 24).

II. THE INADEQUACY OF EXISTING REMEDIES IN TORT AND CIVIL RIGHTS LAW FOR THOSE WHO HAVE BEEN WRONGLY CONVICTED AND LATER EXONERATED

A. A CASE STUDY: THE PEOPLE V MARION COAKLEY[36]

1. The Crime

On October 13, 1983, Olga Delgado and Gabriel Vargas spent the night at the Bronx Park Motel in New York City. In the early morning hours a stranger broke into their room asking for money. The robber locked Mr. Vargas in a closet and raped Ms. Delgado. Still unsatisfied, the stranger demanded more money, and Ms. Delgado proposed driving him to her home where she promised cash could be found. The stranger took the bait and drove Ms. Delgado to her apartment complex. When he saw the silhouette of someone else, Ms. Delgado's brother-in-law, Jose Rios, at the apartment door, the rapist fled, abandoning the car near the Bronx Park Motel.

2. The Investigation

The police were called. The car was discovered and dusted for prints. Ms. Delgado, Mr. Vargas and Mr. Rios each independently described the perpetrator as a black male with a dark complexion, about 26-28 years old, 5 feet 7 inches tall, weighing about 150-160 pounds, with a mustache, a "beard" or "stubble" of chin hair and a short "afro" haircut. Later that night, while Ms. Delgado was taken to Jacobi Hospital where a rape kit was prepared, Mr. Rios and Mr. Vargas were taken to the photo room of the police precinct to look through photo trays. They were told to go directly to one of the officers with any photograph either one of them recognized and not to show it to each other. Nonetheless, when Rios saw Marion Coakley's photograph, he took it over to Vargas and said, "This is the man." Vargas agreed. When Ms. Delgado arrived at the station house from the hospital, she was shown a photo-array from which she, too, selected Mr. Coakley. The record does not reflect what the police may have said to any of the witnesses, nor what either of the witnesses may have said to Mrs. Delgado as she viewed the various photographs.

Marion Coakley was arrested two days later and positively identified in a line-up viewed by Mr. Vargas, Mr. Rios and Ms. Delgado. Mr. Coakley is black, but not dark complexioned. He does not have a Jamaican accent, and on the day of

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36. *Coakley v State of New York*, 571 NYS 2d 867 (NY Ct Cl 1991), *aff'd*, 640 NYS 2d 500 (NYAD 1 Dept 1996) (determining state's liability for the previously determined wrongful conviction under New York State's Court of Claims Act § 8-b). See section IV of this article. (discussing § 8-b in detail). I am familiar with the case because Peter Neufeld and Barry Scheck represented Marion Coakley, post-conviction. I participated in drafting Mr. Coakley's Appellate Division brief responding to New York State's appeal from the favorable Court of Claims decision.

his arrest did not have an Afro, long or short. He is mildly retarded. He was 28 years old at the time, and had been working at various part and full-time positions while living in the Bronx with his sister. The police had a copy of his photograph because Mr. Coakley had been arrested previously.

3. The Defense and the Trial

From the day of his arrest, Marion Coakley protested his innocence. He maintained always that he had been at a bible study meeting at the time of the crime, and he immediately produced eight alibi witnesses. All eight witnesses were interviewed by the prosecutor's office within days of the arrest. Significantly, Marion Coakley also demanded, took, and passed a polygraph test.[37] At trial, the jury was forced to resolve a difficult dilemma—eyewitnesses against alibi witnesses. The jury convicted him. Mr. Coakley was sentenced to prison for an indeterminate term of from five to fifteen years.

4. Post-Conviction

For many wrongfully convicted persons the story ends at sentencing. Marion Coakley was lucky. Twenty-five months later, post-conviction counsel turned up enough "newly discovered" evidence to convince the court to set aside the conviction[38] and the Office of the District Attorney of Bronx County to dismiss the indictment in the interest of justice.[39]

B. FACTUAL MISTAKES AND LEGAL ERRORS IN THE COAKLEY TRIAL

1. Mistaken Eyewitness Identification

Marion Coakley was convicted because three eyewitnesses incorrectly identified him as the perpetrator.[40] In retrospect, the eyewitnesses' testimony, which

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37. Even though the polygraph instrument and test have been refined and improved since the District of Columbia Circuit Court held in *Frye v United States*, 293 F 1013 (DC Cir 1923), that the results of polygraph examinations are inadmissible at trial because the technique was not generally accepted in the relevant scientific community, most state courts still do not admit polygraph evidence. Likewise, the Supreme Court, holding that the military's per se rule excluding polygraph evidence does not violate a criminal defendant's Sixth Amendment right to present a defense, stated that "there is simply no consensus that polygraph evidence is reliable." *United States v Scheffer*, 523 US 303, at ___, 118 S Ct 1261, 1265 (1998).

38. See NY Crim Proc Law § 440.10(g) (McKinney's Consolidated Laws of NY 1994).

39. See N.Y. Crim. Proc. Law § 220.10(i)(g) (McKinney Consolidated Law of N.Y. 1994).

40. Thirty years ago, in *People v Wade*, 388 US 218, 227 (1967), the Supreme Court noted that mistaken identifications may have been responsible for more miscarriages of justice than any other factor. Borchard attributes at least 29 erroneous convictions to mistaken eye-witness identification. See *Convicting the Innocent* (cited note 3). Recent psychological studies have discovered a great deal about eyewitness identification and about identification techniques. Many false identifiers are highly sincere in their false identification and that in turn results in their being as persuasive as eyewitnesses who have made accurate identifications. Gary L. Wells, et al, *Accuracy, Confidence and Juror Perceptions in Eyewitness Identification*, 64 J Applied Psychol 440 (1979). Re-

persuaded the jury to convict, seems particularly unreliable since each of the witnesses had a limited opportunity to observe the perpetrator. From the moment he broke into the motel room, the stranger instructed his victims, at gunpoint, not to look at him. During much of the incident, Ms. Delgado was forced to wear a bath-size towel over her face and head. Moreover, the only light in the motel room emanated from the video image on the television screen. Consequently, up until the time that the stranger and Ms. Delgado got into her car, Ms. Delgado only saw the stranger's face "a couple of times."

While driving in the car, Ms. Delgado remembered looking at the man's face in the reflection of the rear-view mirror, as he adjusted it, and being scared when his eye caught hers. From that point on, throughout the entire drive to her apartment, Ms. Delgado was too frightened to look at the stranger again.

Mr. Rios, who was the first to identify Mr. Coakley's photograph from the police trays, only glimpsed the stranger from behind the doorway of Ms. Vargas's apartment. Mr. Vargas was locked in a closet for a good part of the incident.

2. Non-disclosure of Evidence Helpful to the Accused

Evidence which might have caused the jury to think more skeptically about the strength of the eyewitnesses' testimony was not revealed to defense counsel. Just four days after the crime, Mr. Vargas and Ms. Delgado hired an attorney to initiate a lawsuit against the Bronx Park Motel. The $10 million suit was filed on January 26, 1984, a year and a half before Mr. Coakley's criminal trial began. When the criminal trial started, discovery in the civil suit was well under way, and Ms. Delgado had been examined by a psychiatrist hired by the civil defendant. The District Attorney's office and the police knew about the civil suit before and during the trial, but nonetheless failed to disclose this to the defense.

When they testified against Mr. Coakley, Ms. Delgado and Mr. Vargas knew that the motel management was claiming as a defense to their civil suit that no rape or forced entry had ever occurred and that the whole incident was a pretext to sue the motel. Mr. Vargas and Ms. Delgado expressed concern in a private conversation with the police, prior to their testifying at the criminal trial, that the outcome of the criminal case might affect their civil suit. In short, the pending $10 million civil suit provided Delgado and Vargas with what they perceived to be a huge stake in the outcome of the criminal case. The jury never knew about

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searchers have found that the human mind is so suggestive that memories can even be implanted. See *generally*, Elizabeth F. Loftus and James M. Doyle, *Eyewitness Testimony: Civil and Criminal* 3d Edition 1997 referring particularly to Stephen J. Ceci and Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 Psychol L Bull 403 (1993), and Luus, C.A.E. & Wells, G.L. The Malleability of Eyewitness Confidence: *Co-witness and Perseverance Effects*, 79 J. Applied Psychol. 719-724 (1995). Beginning to doubt the reliability of eyewitness testimony, federal courts have become more receptive to admitting expert testimony on the subject of eyewitness identification. *United States v Brien*, 59 F3d 274 (1st Cir 1995), and *United States v Rincon*, 28 F3d 921 (9th Cir 1994), where the First and Ninth Circuits, although affirming lower court decisions excluding expert testimony, held that there might be occasions where such testimony would be admissible.

the interest these victims had in the outcome of the criminal prosecution, nor could it weigh the effect such an interest would have had on the apparent certainty of their identification or their overall credibility as witnesses.[41]

Moreover, in a psychiatric evaluation conducted pursuant to her civil suit, Delgado revealed that she had been seeing a psychiatrist prior to the rape-robbery and that, as a result of the rape, she had experienced severe emotional trauma and psychological shock. She was confined to her bed for three weeks and to her home for four months. For the two years preceding trial and during the trial itself, Delgado was being medicated due to her psychological problems. Significantly, she revealed to the doctor that whenever she saw other blacks on the street, she thought they looked just like the perpetrator.

The defense was never informed, and so the jury never learned, that another witness, Edith Thompson, a chambermaid at the Bronx Park Motel, reported seeing a person fitting the description of the perpetrator and failed to select Mr. Coakley's photograph out of an array that was shown to her the night of the crime. Ms. Vargas and Mr. Delgado are light-skinned Hispanics and the perpetrator they described was a dark-skinned black. Edith Thompson, on the other hand, is black.[42]

3. Incomplete Police Investigation

Additionally, evidence that pointed to suspects other than Mr. Coakley was not pursued by the police. For example, Olga Delgado testified that she remembered the stranger's adjusting the rearview mirror of her car as he drove her home. When the car was recovered, the police carefully dusted it for prints. A palm print was lifted from the rear view mirror. The police never compared this print with Mr. Coakley's palm, and elimination prints were never obtained. After Mr. Coakley's conviction, post-conviction counsel compared the palm print to Ms. Coakley as well as to the usual drivers of the car, Ms. Delgado and Mr. Vargas. The prints matched none of these people.

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41. Eventually, the lawsuit against the motel was settled for over $100,000. (Conversation with Allen Zaroff, Esq., counsel for Olga Delgado and Gabriel Vargas, Oct 14, 1998).

42. Studies show that eyewitnesses are more likely to correctly identify a person from their own racial background. This is known as the "own-race" phenomenon. In fact, "false-positives" (the positive identification of the wrong individual) occur nearly 30 percent more frequently in cross-racial identifications than in intra-racial identification. Additionally, false-positive identifications are even more likely to result when a white subject attempts to identify a black individual. The "own-race" phenomenon has been attributed to a number of factors: including the belief by the identifiers that minority group members really do "all look alike"; the fact that white identifiers are more likely to attribute guilt to persons of a different race; and the fact that white identifiers expect to identify a black person. Sheri Lynn Johnson, *Cross Racial Identification Errors in Criminal Cases*, 69 Cornell L Rev 934 (1984).

4. The Expert Witness Waffles

Finally, the jury never heard the most persuasive evidence of Marion Coakley's innocence. When Ms. Delgado was taken to the hospital after the rape, semen was found on her underwear. Since Ms. Delgado denied having had sexual intercourse with anyone else that day, only the rapist could have been the person responsible for the presence of sperm. Prior to the trial, the defense secured a court order compelling serological tests to compare blood type groupings from Mr. Coakley with the groupings from the semen stains. Tests were conducted by Dr. Robert Shaler, who was then the Director of Serology at the New York City Medical Examiner's Office. The results of the comparison showed that Mr. Coakley was a type A secretor and that only type B was present in the rape kit sample. In a report prepared prior to trial, Dr. Shaler concluded that Mr. Coakley "could not be the donor of the semen."[43]

Unfortunately for Mr. Coakley, before the trial was scheduled to commence, Dr. Shaler decided that he was no longer completely certain that the tests conclusively excluded Mr. Coakley. Dr. Shaler worried that if Mr. Coakley were a low-level secretor, he might secrete so little blood group substance into his semen as to render it undetectable. In an effort to be cautious, Dr. Shaler informed that court, at a pre-trial hearing, that he wanted to perform additional tests to determine the range of Mr. Coakley's secretion levels, particularly because, as of that date, there were no scientific studies publishing variation in ranges of secretion levels. The trial court ruled that no adjournment for additional tests would be granted and precluded all serological evidence.

Post-conviction, additional serological tests were conducted on multiple semen samples from Mr. Coakley. These tests conclusively showed that Mr. Coakley always secreted sufficient amounts of blood group A so that if he had been the rapist, type A substance would have been present. Moreover, two studies were published in the year following the trial which demonstrated that the variation in blood group substance secretion levels are relatively small. The additional test coupled with the publication of the new scientific studies led Dr. Shaler to conclude to a reasonable degree of medical certainty that Mr. Coakley could not have been the donor of the semen. If the court had granted an adjournment for the additional tests pre-trial, Marion Coakley might well have been acquitted.[44]

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43. Exclusion tests did not have to be conducted on Mr. Vargas because Ms. Delgado and Mr. Vargas had not engaged in sexual intercourse prior to the attack.

44. Other non-evidentiary factors conspired to make it more difficult for Mr. Coakley to establish his innocence. He is slightly mentally impaired and thus unable to express himself as clearly as others. Also, he had been arrested before, and in New York State a defendant who elects to testify on his own behalf can be cross-examined about a prior record, unless the trial judge makes a pre-trial determination precluding the prosecutor from inquiring about it. Generally, trial judges limit questioning about the underlying nature of the charges, while permitting prosecutors to ask an accused whether he has ever been convicted of any felony, *People v Bermudez*, 414 NYS 2d 645 (Sup Ct NY Cty 1979). This compromise ruling normally dissuades defendants from taking the stand. In any event Mr. Coakley did not testify on his own behalf at trial.

C. THE INADEQUACY OF COMMON LAW TORT ACTIONS AND CIVIL RIGHTS LEGISLATION

Although innocent people can be convicted anywhere, only those convicted in jurisdictions with an indemnification statute have a remedy at law for the harm suffered.[45] Neither the common law torts of wrongful arrest nor malicious prosecution, nor the Civil Rights Act of 1871[46] provide redress. A malpractice lawsuit against defense counsel is an option only when there has been ineffective assistance of counsel.

In order to establish a malicious prosecution, claimants must prove not simply that they were arrested and prosecuted and that the proceeding was eventually terminated in their favor, but also that there was no probable cause for their arrest in the first place and that they were prosecuted with actual malice.[47] To establish false imprisonment, claimants must prove that they were knowingly and intentionally confined against their will and without their consent, and that the confinement was not otherwise privileged.[48] Probable cause for an arrest validates the arrest and relieves the defendant of liability under either theory.[49]

The Federal Civil Rights Act which creates the statutory basis for federal actions against state and local police officers for the deprivation of civil rights is equally unavailing. Actions for false arrest can be brought under § 1983, as a violation of the Fourth and Fourteenth Amendments, but once again, only if the initial arrest was made without probable cause.[50] Each of these traditional causes of action is available only when a claimant can establish that the person or entity responsible for the harm was negligent. In many—if not most—of the cases where an innocent person was convicted no single person can be described as having been negligent or at fault.

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45. There are exceptions to every rule. Certainly some individuals who have been wrongly convicted will be able to bring a lawsuit. Mark Bravo, for example, just received almost $4 million for three years in prison. DNA tests in 1994 excluded him as the perpetrator and he was able to win a civil rights lawsuit in California by convincing Judge Cooper of the Federal District Court that the investigators with the State hospital who examined the rape victim had "deliberately and with malice deprived Bravo of his civil rights," Thao Hua, *Falsely Jailed O.C. Man Wins $4 Million Suit,* LA Times (4/20/98). A number of others may be indemnified through passage of a "moral obligation bill" in their state congress. Both of these options will be discussed at some length in the next few pages. For the vast majority neither remedy is available.

46. See 42 USC § 1983, et seq.

47. See *Broughton v State of New York*, 37 NY2d 451 (NY Ct App 1975), and generally W. Page Keeton, et al, Prosser & Keeton on Torts, § 119 at 871 (5th ed 1984).

48. *Broughton*, 37 NY2d at 457.

49. In an action for malicious prosecution, plaintiff must plead and prove lack of probable cause. In an action for false arrest, plaintiff need not allege lack of probable cause, but the defendant may establish justification as a complete defense by showing that the arrest was based on probable cause. Id at 456.

50. "A peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." *Pierson v Ray*, 386 US 547, 555 (1967). See *also Monroe v Pape*, 365 US 167 (1961).

Were claimants able to sue in tort or under the civil rights acts, they would face another legal barrier to recovery in the doctrine of immunity which protects witnesses, police, the prosecution and the judiciary from legal liability for errors committed in the prosecution of crime.[51] Finally, state law statutes of limitation would bar most tort and civil rights actions.[52] State tort claims accrue when a plaintiff knows or has reason to know of the tortious conduct. Generally statutes of limitation require claims to be filed within one to three years from that point. In wrongful conviction cases, years in excess of statutory time can elapse between the time plaintiffs learn of the tortious conduct and their eventual exoneration.

1. Immunity of Victims and Witnesses for Inaccurate or Mistaken Testimony

A person who is misidentified by a victim or a witness cannot recover damages from either. Complainants and witnesses are protected from liability by the doctrine of immunity, unless the prosecution is baseless and the complaint is made with malice.[53] In Marion Coakley's case, it would have been impossible to argue that the victim's complaint was made with malice. Apart from the hotel's allegations in defense of the pending lawsuit (which may very well have been hypothetical), there is no reason to doubt that Mrs. Delgado was raped and that she and the witnesses were completely convinced of Marion Coakley's guilt. Mrs. Delgado's credibility was supported by her cooperation with the police and the prosecution, and her traumatic reaction, as evidenced by her later fear of black men. There is no suggestion anywhere in the record of fabrication, even if the witnesses had a subsequent financial interest in being "right."

2. Police Immunity from Civil Liability for Lawful Arrest

In hindsight the police investigation leading to Marion Coakley's arrest appears rudimentary and slipshod. For starters, the police might have compared the palm print, lifted from the rear view mirror of the car, with Mr. Coakley's hand print. Nonetheless, although the fact investigation would have been more complete—and perhaps more accurate—had a print comparison been conducted, an incomplete investigation is neither reversible error nor a harm which can be remedied via a tort or civil rights lawsuit.

Once police have probable cause to make an arrest, they have no duty to continue to investigate other evidence which might prove the innocence of the ac-

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51. Witness immunity is discussed in section II; police immunity at C.2; prosecutorial immunity at C.3; and the immunity of public defenders is discussed at C.4.

52. There is no federal statute of limitations under 42 USC § 1983. § 1983 provides that the law of the state in which the federal court sits shall govern. See *Wilson v Garcia*, 471 US 261, 276 (1985).

53. See, for example, *Anthony v Baker*, 955 F2d 1395 (10th Cir 1992); *White v Frank*, 855 F2d 956 (2d Cir 1988); *Nardelli v Stanberg*, 377 NE 2d 975 (1978); *Martine v City of Albany*, 364 NE 2d 1304 (NY Ct App 1977).

cused or which might point to another suspect.[54] The law does not require law enforcement to pursue every single piece of potential evidence, especially when there is reason to believe that the evidence would add little to the quantum already available to the prosecutors.

The police officers investigated Mr. Coakley's case with the same degree of care and precision, or lack thereof, brought to bear on the great majority of routine criminal investigations.[55] Significantly, there was not one but three eyewitnesses who positively identified the accused as the perpetrator in identification procedures sanctioned by the courts as reliable and non-suggestive.[56] The identifications alone provided probable cause to arrest, and sufficient evidence to indict and hold the accused over for trial.[57]

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54. "The obligation of local law enforcement officers is to conduct criminal investigations in a manner that does not violate the constitutionally protected rights of the person under investigation. Therefore, whether the officers conducted the investigation negligently is not a material fact." *Orsatti v New Jersey State Police*, 71 F3d 480, 484 (3d Cir 1995). The police are not required to interview a suspect's alibi witnesses after making an arrest supported by probable cause. See, for example, *Romero v Fay*, 45 F3d 1472 (10th Cir 1995). Once police officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence. See, for example, *Schertz v Waupaca County*, 875 F2d 578, 583 (7th Cir 1998). Nor do the police have an "affirmative obligation to seek out exculpatory information of which the officer is not aware." *Kelly v Curtis*, 21 F3d 1544, 1551 (11th Cir 1994). "[H]aving once determined that there is probable cause to arrest, an officer should not be required to reassess his probable cause conclusion at every turn, whether faced with the discovery of some new evidence or a suspect's self-exonerating explanation from the back of the squad car." *Thompson v Olson*, 798 F2d 552, 556 (1st Cir. 1986).

55. See generally, Stanley Z. Fisher, *Just the Facts Ma'am: Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 New Eng L Rev 1 (1993).

56. Showing photographs of possible suspects to crime victims is a time-honored police procedure sanctioned by the courts. A criminal defendant has only the due process right not to be the object of unnecessarily suggestive identification procedures, whether those procedures are photo arrays or other types of procedures. *United States v Thai*, 29 F3d 785, 807 (2d Cir 1994). See also *Manson v Braithwaite*, 432 US 98 (1977) (addressing the admissibility of pre-trial identification based on showing of a single photograph); *Jarrett v Headley*, 802 F.2d 34,41 (2d Cir 1986) (holding that the array must not be so limited that the defendant is the only one to match the witness's description of the perpetrator). *United States v Maldonado-Rivera*, 922 F2d 934, 974 (2d Cir 1990). However, in New York State, joint viewing of a line-up has been held to be improper because the various witnesses may suggest to each other that their choices are more or less correct, although the impropriety is not always reversible error. See, for example, *People v Gonzalez*, 536 NYS 2d 297 (NY App Div 4th Dept 1988) and *People v Fernandez*, 440 NYS 2d 677 (NY App Div 2d Dept 1981). But see *People v Byrd*, 583 NYS 2d 849 (NY App Div 2d Dept 1992) (holding that the complainants' joint viewing of a stack of photos, with the defendant's picture on top, was not unduly suggestive).

57. The Supreme Court has defined probable cause as: "facts and circumstances sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense," *Gerstein v Pugh*, 420 US 103, 111 (1975)*citing Beck v Ohio*, 379 US 89, 91 (1964). Police officers may presume that the citizen making the accusation is reliable. An identification by an eyewitness of an accused as the perpetrator of a crime constitutes probable cause. See, for example, *People v McCain*, 543 NYS 2d 438 (NY App Div 1st Dept 1989); *People v Peterkin*, 521 NYS 2d 517 (NY App Div 2d Dept 1987).

Finally, since probable cause determinations are often quite difficult, and because the courts believe that law enforcement officials should be liable only where their conduct is clearly proscribed, courts conclude that the police are protected from suit for their official actions by the doctrine of qualified immunity even where there is only arguable probable cause.[58]

3. Prosecutorial Immunity for Failure to Disclose Information

The prosecutors who presented the case against Marion Coakley possessed evidence in their files that they failed to disclose to the defense prior to trial. The defense was never informed about the $10 million lawsuit the complainant brought against the motel. Had defense counsel known about the suit, he might have argued to the jury that the crime never occurred, as the motel claimed in defense of the suit, or he might have contended that the victim and eyewitnesses were—at a minimum—reluctant to admit doubts about the certainly of their identification because doubts could have adversely affected their chance to recover money damages. Moreover, the prosecutors never told the defense about the complainant's psychiatric care, depriving the defense of the opportunity to discuss with the jury whether the complainant's mental and emotional state affected her credibility as a witness. Most importantly perhaps, the defense never heard that after the crime the complainant thought that all the African-American men she saw on the street were the rapist.

Prosecutors are both legally and ethically obligated to reveal exculpatory evidence to the defense,[59] and at least one appellate level court in New York has held that, where a complainant's lack of a motive to lie is a central issue, the prosecution's failure to disclose the existence of a complainant's multi-million dollar lawsuit against the defendant is a violation of Brady requiring reversal of the conviction.[60] Thus, if the Coakley case had been reviewed on direct appeal, the conviction might have been reversed.[61] On the other hand, whether or not

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58. "Qualified immunity gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter v Bryant*, 502 US 224, 229 (1991). That is not to say that the police may not be sued for pressuring witnesses to fabricate or confabulate testimony, or to make a false identification, or for deliberately withholding exculpatory evidence. See, for example, *Snyder v City of Alexandria*, 870 F Supp 672 (E D Va 1994); *Goodwin v Metts*, 855 F2d 157, 163 (4th Cir 1989). Compare *Briscoe v LaHue*, 460 US 325 (1983) (holding that police officers who testify falsely and even maliciously at trial may not later be sued under 42 USC § 1983 for damage caused by testimony) *with Malley v Briggs*, 475 US 335 (1986) (holding that when a police officer functions as a complaining witness, he is not immune from suit, under the common law or § 1983 if the prosecution was baseless); and *White v Frank*, 855 F2d 956 (2d Cir 1988) (holding that police officers who initiated a baseless prosecution would be liable to the victim).

59. See, for example, *Brady v Maryland*, 373 US 83 (1963) and *United States v Bagley*, 473 US 667 (1985). See also ABA Standards for Crim Just § 3-3.11(a) (3d ed 1993).

60. *People v Wallert*, 469 NYS 2d 722 (NY App Div 1st Dept 1983).

61. Because Mr. Coakley's conviction was set aside on a collateral motion for a new trial and not on direct appeal, the appellate courts were never asked to determine whether the prosecu-

the error would have triggered a reversal, the prosecutor's conduct is protected by the doctrine of absolute immunity. A prosecutor acting within the scope of his duties as an advocate "in initiating and pursuing a criminal prosecution" is not amenable to suit.[62] The Supreme Court extends absolute immunity to prosecutors acting in the exercise of their discretion in order to protect the prosecutor "from harassing litigation that would divert his time and attention from his official duties" and in order to enable "him to exercise independent judgment when deciding which suit to bring and in conducting them in court."[63]

4. Difficulty of Establishing Ineffective Assistance of Counsel and Potential Immunity for Defense Counsel

Marion Coakley might have considered bringing a malpractice suit against his defense attorney on the theory that counsel was negligent in failing to learn of Dr. Shaler's uncertainty, regarding Mr. Coakley's secretion levels, sufficiently far enough in advance of trial to permit the additional necessary testing to be accomplished prior to the trial date. It is doubtful that such a suit would have been successful, however, because Mr. Coakley would have had difficulty establishing that his attorney failed to meet the requisite standard of care.[64]

In malpractice suits against criminal lawyers, negligence is treated as the equivalent of ineffectiveness.[65] Ineffectiveness has been defined by the Supreme Court as prejudicially deficient—a remarkably low standard.[66] In Strickland, where the defendant complained that his counsel failed to seek out character witnesses and neglected to request a psychiatric examination or to prepare a presentence report, the Supreme Court found no ineffectiveness holding the defendant failed to establish either unreasonably deficient performance or prejudice.

In Mr. Coakley's case, defense counsel's preparation and performance would probably not have been considered unreasonably deficient. In fact, counsel's

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tion's failure to reveal this information was reversible error. Post-conviction counsel learned of the lawsuit by interviewing the victim. The information was brought to the attention of the court by way of motion to set aside the verdict.

62. *Imbler v Pachtman*, 424 US 409, 410, (1976). See generally, *Kalina v Fletcher*, 522 US 118 (1997).

63. *Kalina* at 506, citing *Imbler v Pachtman*, 424 US 409.

64. In order to bring a successful malpractice claim, a plaintiff must establish: 1) the existence of the attorney-client relationship; 2) the attorney's duty to act according to a particular standard of case; 3) the attorney's failure to meet the standard; and 4) that some damage was done as a result of the failure. See W. Page Keeton, et al, Prosser & Keeton on the Law of Torts, § 30 at 164-165 (5th ed 1984). See also *Shaw v State*, 861 P 2d 566, 569 n2 (Alaska 1993); *Schulman v Terrence J. O'Hagen, P.C.*, 433 NW 2d 839, 846 (Ct App Mich 1988); *Krahn v Kinney*, 538 NE 2d 1058, 1061 (Ohio 1989).

65. "Even though 'the issue in ineffectiveness cases is not a lawyer's culpability, but rather his client's constitutional rights," *United States v Decoster*, 487 F2d 1197, 1202 n21 (DC Cir 1973), a court determination ordering reversal on ineffectiveness is some reflection that the trial counsel failed to use the skill, diligence and degree of care that would have been exercised by a reasonably competent attorney in similar circumstances. See generally, Richard Klein, *Legal Malpractice, Professional Discipline and Representation of the Indigent Defendant*, 61 Temp L Rev 1171 (1988).

66. *Strickland v Washington*, 466 US 668 (1984).

preparation was better than the average representation afforded to indigent clients across the country by underfunded and overworked defense counsel.[67] Mr. Coakley's counsel found, interviewed, and examined at trial eight alibi witnesses. Counsel arranged for his client to take a polygraph test and informed the court of the positive results. He found an expert and managed to have the necessary serological comparison tests completed. He asked the judge for an adjournment so that his expert could testify. His preparation can hardly be characterized as "prejudicially deficient."

Furthermore, even if Mr. Coakley was able to establish the requisite breach of a standard of care, he would once again have been blocked by the doctrine of immunity. Traditionally, courts have not afforded court-appointed or public defenders immunity protection, since they perform essentially the same role as do privately retained counsel who certainly are not protected from suit.[68] However, there has been some movement in the state courts to grant court appointed or assigned counsel some measure of immunity in recognition of the difficulties of public defender practice.[69] Although many commentators deplore any trend toward immunity, as a further abridgement of the rights of the accused,[70] at least six states have seen fit to protect the public defender from suit for negligence arising out of the course of professional responsibilities.[71] In New York the only case law on point is a 1978 decision by a trial level Supreme Court Justice holding that public defenders are immune from civil liability for judgmental or discretionary acts.[72] In the absence of higher authority to the contrary it is not unreasonable to conclude that Mr. Coakley's suit against his public defender would have been dismissed.

Marion Coakley's prosecution and trial illustrate how easily innocent people can be convicted despite representation by counsel—even counsel who bothered to investigate the facts and prepare a defense. The outcome-determinative errors

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67. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff L Rev 329 (1995) and Richard Klien, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hast Const L Q 625 (1986).

68. See *Spring v Constantino*, 362 A.2.d 871 (Sup Ct Conn 1975); *Reese v Danforth*, 406 A 2d 735 (Sup Ct Pa 1979). See also Harold Chen, *Note, Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 Duke L J 783, 792 (1996).

69. See generally, Vick, *Poorhouse Justice (cited in* note 68).

70. See generally, Chen, *Note,* 45 Duke L J 783, 792 (1996); David Sadoff, *Note, The Public Defender as Private Offender: A Retreat from Evolving Malpractice Liability Standards for Public Defenders*, 32 Am Crim L Rev 883 (Spring 1995); David J. Richards, *Note, The Public Defender Defendant: A Model Statutory Approach to Public Defender Malpractice Liability*, 29 Val U L Rev 511 (Fall 1994).

71. Nevada: *Morgano v Smith*, 879 P 2d 735 (Nev 1994)and *Ramirez v Harris*, 773 P.2d 343 (Nev 1989); Delaware: *Vick v Haller*, 512 A 2d 249, 252 (Sup Ct Del 1986) *aff'd*, 514 A 2d 782 (Del 1987)and *Browne v Robb*, 583 A 2d 949 (Del 1990); Vermont: *Bradshaw v Joseph*, 666 A 2d 1175, 1176 (Sup Ct Vt 1995); New Mexico: *Herrera v Sedillo*, 740 P 2d 1190 (NM Ct App 1987); and *Coyazo v State*, 897 P.2d 234 (NM Ct App 1995); Minnesota: *Dziubak v Mott*, 503 NW 2d 771 (Minn 1993). In Pennsylvania public defenders are now only liable for conduct exhibiting reckless or wonton disregard of the defendant's interest not for mere negligence. See *Bailey v Tucker*, 621 A 2d 108 (Pa 1993).

72. *Scott v Niagra Falls*, 407 NYS 2d 103 (NY Sup Ct 1978).

were multiple, routine, non-purposeful, non-negligent, and, importantly, invisible during the investigation and trial stages. Not until proof of innocence was obtained post-conviction did the errors become clear.[73] Moreover, the errors in the Coakley case were errors of fact, once again illustrating that improvements in criminal procedure laws will at best reduce the frequency of wrongful convictions, but not eliminate them altogether.[74] Innocent people will continue to be convicted.

In the typical wrongful conviction case, the existence of probable cause for an arrest, the various immunity doctrines, the time between the errors leading to conviction and eventual release, and the difficulty of establishing ineffective assistance of counsel present insurmountable barriers to a civil lawsuit for damages. On a practical level lawsuits can be expensive—prohibitively so for plaintiffs who have just been released from prison—and deadly slow.

Fortunately, Mr. Coakley was convicted in New York, where there is an indemnification statute.[75] After the conviction was set aside and the indictment dismissed, Mr. Coakley brought a successful claim for indemnification.[76] If he had been convicted in the thirty-six states without such a statute, he would have had to find satisfaction in his freedom alone.[77]

III. THE JUSTIFICATION FOR INDEMNIFICATION LEGISLATION

Thus far, this article has presented evidence that innocent people have been, and will continue to be, unjustly convicted, as an unfortunate but inevitable consequence of the routine operation of the criminal justice system, and has demonstrated that neither traditional fault-based tort actions nor civil rights statutes provide a remedy.

Assuming that the failure to indemnify those who have been wrongly convicted is a problem worthy of solving, the next logical step would be to propose and discuss solutions. But before turning to a discussion of remedies, it is necessary to consider the assumption: to assess whether the absence of a financial remedy is a problem which society has a responsibility to solve.

Clearly, states have no obligation, enforceable in law, to indemnify.[78] In the absence of a legal obligation, some will no doubt assert that society should be

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73. It is also completely possible for an innocent person to be convicted in an error-free trial. Any time a victim or a witness sincerely—but incorrectly—misidentifies someone as the perpetrator of a crime, a miscarriage of justice can occur.

74. See Radelet, *In Spite of Innocence* at 287 (cited in note 4).

75. NY Court of Claims Act § 8-b, discussed in section IV.

76. *Coakley*, 571 NYS 2d 867 (cited in note 36).

77. He might have had a political option, if he could have convinced the state legislature to enact a special bill for his benefit—an extraordinary measure infrequently used and discussed in Part III of this article.

78. Edwin Borchard wrote a series of law review articles attempting to describe a legal obligation to indemnify the wrongly convicted. Ultimately, however, his attempts to discover a legal obligation in the concept of eminent domain or through an analogy to compulsory jury or mili-

absolved from responsibility to the wrongly convicted, pointing out that society does not attempt make whole every person who has suffered an injury. Certain harms are simply accepted as part of life.

On the other hand, to others it will seem unquestionably fair, just, and humane to indemnify those who have been imprisoned for crimes they did not commit. But describing a desired outcome in positive terms is hardly the same as articulating a rationale compelling it. Although society is in a better position to bear the cost of the injury than is the person who has been wrongly convicted, that observation can be made any time a non-negligent accident occurs.

What distinguishes the situation of the wrongly convicted from that of others who have been accidentally injured is the state's involvement. After all, it is the state, through operation of one of its most essential services—the criminal justice system—that has inflicted the harm. Although it may be impossible to hold any individual law enforcement officer, or any particular municipality, liable, the state's responsibility for the injury is sufficient to generate a moral obligation. Moreover, if neither compassion nor government complicity are sufficient motivation, an additional argument compels creation of a remedy. We already compensate some unjustly convicted people by statute in a few states and by individualized legislation in some others. Basic fairness requires compensation for all if there is compensation for some.

A. MORAL OBLIGATION BILLS

Moral obligation bills are specially drafted acts generally used to pay otherwise unenforceable claims on behalf of individuals harmed by the state. The moral obligation of the state to pay for "injury caused by [an] act of the state, . . . or arising in the course of service to the state," has long been recognized in many jurisdictions.[79] "The state, as well as an individual, may be honorable and may voluntarily recognize just obligations which it fairly and honestly ought to pay, even though they do not constitute purely legal claims [that could be] enforced under compulsion of judgment and execution."[80] "It is generally recognized that a moral obligation is more than a mere desire to do charity or to appropriate money in acknowledgment of gratitude. It is an obligation which, though lacking any foundation cognizable in law, springs from a sense of justice and equity, that an honorable person would entertain, but not from a mere sense of doing benevolence or charity."[81] Moral obligation bills have served a variety of purposes: From indemnifying a private construction company for work done and debt

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tary service proved unpersuasive. The citations to his series are collected in King, 118 U Pa L Rev 1091, 1092 n13 (1970).

79. See, for example, *Ausable Chasm Co. v State*, 194 NE 843, 845 (1935); *Dickinson v Bradley*, 298 So 2d 352, (Fla 1974); *Opinion of the Justices to the Senate*, 238 NE 2d 855 (Mass 1968); *Austin W. Jones Co. v State*, 119 A 577 (Me 1923); *Koike v Board of Water Supply, City and County of Honolulu*, 352 P 2d 835 (Hawaii 1960).

80. *Williamsburgh Savings Bank of Brooklyn v State*, 153 NE 58, 60 (Ct App NY 1926).

81. *Hawai'i Koike v Board of Water Supply*, at 105-106 (cited in note 80).

incurred at the state's behest,[82] to compensating the wife of a sheriff killed by a man in his custody,[83] to compensating a child severely injured while in the State's custody,[84] to indemnifying individuals wrongly convicted. Were "moral obligation" bills universally available and uniformly applied, there would be no need to pass general indemnification legislation. That is not the case.

Ultimately, the private bill remedy is an inadequate solution for individuals who have been wrongfully convicted. First of all, some states interpret their constitutions to forbid the use of such legislative acts, eliminating the bill as an option.[85] Secondly, the success of any such private bill depends more on the political connections of the person introducing the bill and the political climate of the day than on the merits of the case. Third, the process can be lengthy and the outcome is always uncertain.

In Virginia, a jury deliberated for only two hours before convicting Edward Honaker of sexual assault, sodomy and rape. Sentenced to life in prison, Mr. Honaker served ten years of his sentence before he was granted a pardon by the Governor of Virginia. The investigation and trial record reveal a multitude of mistakes which parallel those made in the Coakley case.[86] Failure of the police to thoroughly investigate, a heartfelt but incorrect identification by the victim, and non-disclosure of exculpatory evidence affecting the credibility of the victim's testimony[87] all combined to miscarry justice. As in the Coakley case, serological evidence conclusively established innocence post-conviction.

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82. *Williamsburgh Savings*, 153 NE 58 (1926) (cited in note 80).

83. *Gross v Gates*, 194 A 465 (Vt 1937).

84. *In re Guardianship of Gamble v Wells*, 436 So 2d 173 (Fla App 2d Dist 1983).

85. Many state constitutions forbid the payment of private claims from public funds, or the creation of private laws where general laws could be enacted, which would effectively prohibit the use of a private bill to indemnify the wrongly convicted. See for example, Ore Const Art III, § 24. For states which interpret their constitutions to prohibit special bills, see, for example, *Rector v State*, 495 P 2d 826 (Okla 1972) (Oklahoma); *Mahwah and People v Bergen County Bd of Taxation*, 486 A 2d 818 (1985); and *Fred P. Adams v Harris County*, 530 SW 2d 606 (Tex Civ App 14th Dist 1975), appeal dismissed 429 US 803 (1976) (Texas).

86. See NIJ Report, (cited in note 6).

87. After the conviction it was discovered that the victim and her boyfriend had been secretly hypnotized to enhance their memory. Apparently the victim had initially admitted to not clearly seeing her attacker during the incident. Her recollection improved, allegedly, after hypnosis. Courts have struggled over the question of whether, and under what circumstances, to admit testimony that has been hypnotically refreshed, because hypnotism has been shown to undercut the reliability of eyewitness testimony. Apparently hypnotism puts a subject into a state of heightened suggestibility which may cause the inaccurate recall of facts in order to please the hypnotist. See generally, Jack Fox & Julian Fox, *Reciprocal Hypnosis, A New Standard for Admission of Post-Hypnotic Testimony*, 20 Pace L J 815 (1989). Individuals who have been hypnotized may confabulate, may be unable to differentiate between accurate and inaccurate memories, and may be overly confident about the accuracy of their memories. As a result of these concerns, state and federal courts have adopted a variety of approaches to the admissibility of such testimony. All courts, however, insist that the party against whom the hypnotically refreshed testimony is being introduced be notified of the procedure so that arguments against admissibility can by constructed and so that the witness's credibility can be tested through cross-examination, even if the testimony is admitted. The Supreme Court has held only that a per se rule which prohibits a defendant from testifying on his own behalf when his memory has been refreshed through

Virginia's governor pardoned Edward Honaker on October 21, 1994, after he had served ten years of his sentence.[88] Because Virginia has no indemnification statute, the only way Mr. Honaker could secure compensation was by convincing the state legislature to pass a private bill authorizing an award to be paid from state funds. Fortunately, Mr. Honaker was able to interest an attorney—an old school friend of a state legislator—who was willing to draft legislation on his behalf and to lobby extensively for its passage:[89]

> Virginia is a bicameral state, which means we had to lobby for the Bill both in the House and in the Senate. It was assigned to a Claims Committee and in all we made at least four appearances before the Legislature. There was opposition and we had to explain the merits of the case and why we came up with the monetary request we did. It was almost like arguing the case before a jury, only here it was a blue ribbon panel composed of many lawyers. There were conservative legislators who were guarding the money as if it were their own. A certain number of them also felt that all people charged with crime are guilty, regardless of what the truth is.[90]

Eventually, the bill appropriated $500,000 for Edward Honaker. Without Mr. Honaker's well-connected advocate, no bill would have passed and no money would have been forthcoming. Had Mr. Coakley been convicted in Virginia, he might not have fared so well.

In addition to their essentially political character, private bills can work their way very slowly through the political process. In Florida, it took more than twenty years for two men, who were wrongly convicted of murder and sentenced to death, to receive compensation from the state. Freddie Pitts and Wilbert Lee were pardoned by the governor in 1975 after two trials and nine years on death row.[91] They finally won an award May 1998.[92]

Further, the private bill process is susceptible to manipulation by the unscrupulous since the decision to vote an award is based upon politicians' speeches made on the floor of the congress, not upon sworn testimony subject to cross examination at a fact-finding hearing. Pennsylvania's recent experience serves as a warning.

In 1995, Pennsylvania's State Senate approved legislation awarding $325,000 in compensation to Mr. Hayden Jones, who was convicted in 1949 on what he convinced the state senators were false charges of child molestation. Mr. Jones,

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hypnotism is an unconstitutional infringement on the right of a defendant to testify and present evidence in his own behalf. *Rock v Arkansas*, 483 US 44 (1987).

88. NIJ Report, at 59 (cited in note 6).

89. 1996 Va. Acts Assembly H 222 (enacted).

90. Letter from Murray Janus, Esq. to the author (Aug 5, 1996) (on file with the author).

91. "Authorities in Port St. Joe arrested Pitts and Lee shortly after the 1963 murders of two gas-station attendants because they had been involved in a ruckus over the attendants' refusal to let them use a whites-only restroom." Lucy Morgan, *After 22 Years Bill Passes on Claim of Ex-Death Row Inmates*, St. Petersburg Times, (5/1/98).

92. The original award of $500,000 each was reduced to $350,000 by an administrative judge. Rosa Reed, *State Compensation Falls Short for Pitts and Lee*, Miami Times, (6/14/98), 1998 WL 113683995.

at seventy-two was a sympathetic character. He had left prison in 1968, after having spent nineteen years in jail—five in solitary confinement. He was poor, not even qualifying for Social Security benefits since he had never been physically strong enough to work after his release from prison.[93]

On November 21, 1995, State Senator Robert Tomlinson gave an "impassioned" speech and convinced the Senate to vote a bill for Jones. Jones died before the award was confirmed in the House. However, his death turned out to be fortuitous for the senators who were spared embarrassment when they stumbled upon a twenty-year-old investigation into Mr. Jones' past, conducted by previous lawmakers who were considering a similar bill, casting doubt upon Jones' claims of innocence.[94] Ultimately, there is no guarantee that an innocent person will benefit from a private bill and no guarantee that the person who succeeds is truly innocent.

Finally a bill, once passed, must be signed into law by the governor and "gubernatorial treatment of such legislation has never been consistent."[95] Amounts awarded depend more on the size of the state coffers at the time or the political climate than on factors related to the suffering and loss of the claimant. The Law Review Commission recommending the creation of the Unjust Conviction Statute in New York wrote:

> The enactment of such legislation is simply an *ad hoc* approach which is not in the best interests of the State, not only because it can fail to compensate the truly aggrieved, but also because it can lead to charges of influence, political power, etc., that create an appearance of impropriety and undermine the integrity of the legislative process.[96]

Although private bills are not the solution for the wrongly convicted, they embody the rationale for the solution. If the state recognizes its obligation to one wrongly convicted individual, it recognizes its obligation to all.

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93. Julie L. Nash, *Bucks Man Seek Recompense Decades After 'Sordid Injustice,'* The Allentown Morning Call, (8/27/95), 1995 WL 9604232.

94. Mario F. Cattabiani, *Anatomy of a Hoax * Lawmakers, Media Believed Jones' Story of a Family Tragedy, Injustice and Science Fiction*, The Allentown Morning Call, (5/4/97), 1997 WL 5695496.

95. "In New York, Governor Dewey and Governor Rockefeller would approve such bills only if the facts were such that a pardon on the ground of innocence would be in order." See Memorandum of Approval of Governor Dewey, L. 1946, ch 974 [claim of Caruso] Apr 9, 1946; Memorandum of Disapproval of Governor Rockefeller, Assembly Bill § 720-A [claim of Zimmerman] May 22, 1969). Governor Carey, on the other hand, did not adhere to such a strict standard in approving such legislation (see Memorandum of Approval, L. 19881, ch 608 [claim of Zimmerman], July 17, 1981)." New York Law Revision Commission, Report to the governor on Redress for Innocent Persons Unjustly Convicted and Subsequently Imprisoned, 1984 McKinney's Session Laws of New York, at 2914 [Hereinafter Law Revision Commission]. New York depended upon "moral obligation" bills prior to passage of the State's Unjust Conviction Law in 1984. In the 37 years prior to the passage of indemnification legislation only 5 men "benefitted from the enactment of a private bill in the State Legislature." The fact that one of these men was particularly well known to the public undoubtedly helped to garner the requisite votes in support of his claim. Law Revision Commission at 2914.

96. See Law Revision Commission, id at 2915.

Other objections to indemnification legislation might be practical. State governments could fear potential expense or the impact of a new category of cases on the courts or even the effect of the remedy on the criminal justice system. The best answer to those concerns lies in a study of existing statutes[97] which prove the fears to be unfounded, and in the experience with crime victims' compensation statutes which were enacted to assist a similarly situated class of innocent injured people.

B. CRIME VICTIMS' COMPENSATION

Crime Victims' Compensation statutes became law in all fifty states in the fifty years between 1954 and 1992.[98] The legislation was remarkably attractive to state governments which rapidly endorsed the new provisions, untroubled by the additional expense the statutes would cause, the necessity of establishing a new and separate bureaucracy, or the lack of a "legal right" justifying creation of the legislation.[99]

Enacting victims' compensation statutes was one of the many achievements attributable to the victims' rights movement[100] which has its roots in the work of Margery Fry, an energetic and dedicated English magistrate.[101] Ms. Fry was troubled by what she saw as the peripheral role relegated to complainants.[102]

Mrs. Fry's work had an enormous impact.[103] Within a few years of the publication of "Justice for Victims" in 1957, New Zealand established a system to compensate victims of crimes.[104] Great Britain adopted its own version in 1964.[105]

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97. The final section of this article, Section IV, examines existing statutes.

98. Dale G. Parent, et al, *Compensating Crime Victims: A Summary of Policies and Practices*, Office of Justice Programs, National Institute of Justice, US Dept of Justice (1992).

99. The states were encouraged to enact the legislation by passage of the Victims of Crime Act (VOCA), 42 USCA. §§ 10601-10604, in 1994, providing federal grants to supplement state funding of victim compensation programs.

100. The Federal Victim and Witness Protection Act of 1982, 18 USCA §§ 1512-1515, §§ 3579-3580 provides crime victims' restitution, the right to a statement at sentencing in federal cases and victim and witness protection.

101. Ms. Fry lived from 1876-1958.

102. To rectify the imbalance, she initially proposed that complainants be paid restitution from offenders. Restitution would have a therapeutic effect on both the offender and the complainant, she claimed. But a few years later, she amended her approach to advocate for governmental compensation realizing that, therapeutic effect or not, the typical offender would not possess the financial means to make adequate reparations. Margery Fry, *Justice for Victims*, The Observer (7/7/57), *reprinted in* 8 J Pub L 192 (1959), quoted and documented in Daniel McGillis and Patricia Smith, *Compensating Victims of Crime: An Analysis of American Programs*, National Institute of Justice, US Dept of Justice (1983) at 3. Margery Fry's work is discussed generally in Herbert Edelhertz & Gilbert Geis, *Public Compensation to Victims of Crime* (1974). [Hereinafter Edelhertz and Geis].

103. Commentators report that the debate over whether or not to compensate victims is strewn with references to her thoughts and ideas. Edelhertz and Geis, id.

104. Parent, et al, *Compensating Victims of Crime*, at 3 (cited in note 98).

105. Id at 4.

The idea spread to America where Arthur J. Goldberg, a Supreme Court justice popularized it in a 1964 law review article:

> Whenever the government considers extending a needed service to those accused of crime, the question arises: but what about the victim? We should confront the problem of the victim directly; his burden is not alleviated by denying necessary services to the accused. Many countries throughout the world, recognizing that crime is a community problem, have designed systems for government compensation of victims of crime. Serious consideration of this approach is long overdue here. The victim of a robbery of an assault has been denied the "protection" of the laws in a very real sense, and society should assume some responsibility for making him whole.[106]

A Gallop poll, conducted the next year, proved that the general population supported the basic idea of victim compensation.[107] In response, California became the first state to enact legislation to compensate victims of crimes.[108]

New York followed closely behind, motivated by newspaper reports of the death of Mr. Arthur Collins, a good Samaritan, who had come to the aid of a fellow subway rider and had been killed for his efforts.[109] The Collins killing took place at a time when the country's apprehension about street crime, especially in the cities, was increasing, and when little attention had been paid to the victims of crime generally.[110]

The Collins story galvanized public opinion in New York. The City Council passed a good Samaritan law authorizing the Board of Estimate to make awards to victims.[111] Governor Rockefeller appointed a three-person committee chaired by Attorney General Louis L. Lefkowitz to study the subject. The Committee

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106. Arthur J. Goldberg, *Equality and Governmental Action*, NYU L Rev 39, 224 (Apr 1964), quoted in Edelhertz and Geis, at 12 (cited in note 102).

107. Persons were asked, "Suppose an innocent person is killed by a criminal—do you think the state should make financial provisions for the victim's family?" Sixty-two percent thought that the state should make such provision, 29 percent did not, and 9 percent had no opinion. See Edelhertz and Geis, at 13 (cited in note 103).

108. See Cal Penal Code § 679-679.04 (1998).

109. See Edelhertz and Geis, at 21 (cited in note 102).

110. As late as 1974, Edelhertz and Geis were writing that:

> The fate of victims of crime remains an almost totally neglected area of study in the United States and elsewhere. A nascent field of investigation, rather gracelessly dubbed 'victimology,' has rather recently come into existence, but victimological studies have concentrated almost exclusively on the extent of involvement of victims in their own undoing. Investigations of homicide deaths, for instance, show that strikingly often those killed duplicate in significant ways the background and patterns of life of those who kill them—both parties to the homicide, offender and victim, are apt to have previous arrests for crimes of violence, for instance, and both are likely to be intoxicated. Who becomes the murderer and who the murdered under such circumstances, appears almost fortuitous. Studies of forcible rape have focused on the subtle and not so subtle indiscretions of the victim in bringing about her downfall.

Edelhertz and Geis, at 14 (cited in note 103).

111. Id at 22.

held public hearings and drafted legislation which was soon enacted making New York state the third in the nation to enact victims' compensation legislation.[112]

Victims' compensation legislation was easy to enact even in the absence of a legal duty or obligation. State legislatures carefully shied away from declaring that victims of crimes have a right to compensation, characterizing the obligation as a 'moral responsibility' to assist crime victims.[113] Courts, too, have carefully interpreted victims' compensation statutes so as not to create a "right" to compensation.[114]

To overcome the difficulty presented by the absence of a cognizable "right" to protection, early proponents of crime victims' legislation attempted to gain support for the legislation by trying to show that such statutes would be useful to society as a whole. These advocates argued that such legislation helped reduce crime by demonstrating even more clearly to criminals our moral repulsion at their acts through our payments to victims and by promoting victim cooperation with law enforcement agencies.

Such optimistic theories were completely unsupported by documentation. By 1962 studies revealed that states operating victim compensation programs did not have higher violent crime-reporting rates.[115]

Some opponents of the legislation argued that victims should not be compensated because they were responsible for their own victimization.[116] Others ob-

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112. NY Exec Law §§ 620-635 (1966).

113. Florida's statute is representative. The Preamble reads:

> The legislature recognizes that many innocent persons suffer personal injury or death as a direct result of adult and juvenile criminal acts or in their efforts to prevent crime or apprehend persons committing or attempting to commit adult and juvenile crimes. Such persons or their dependant may thereby suffer disabilities, incur financial hardships or become dependant upon public assistance. The Legislature finds and determines that there is a need for government financial assistance for such victims of adult and juvenile crime. Accordingly, it is the intent of the Legislature that aid, care, and support be provided by the state, as a matter of moral responsibility, for such victims of adult and juvenile crime.

Fla St Ann § 960.02 (1978); See also the preamble to New York's similar law at NY Exec Law §§ 620-635 (1966).

114. See, for example, *White v Violent Crimes Compensation Board,* 388 A 2d 206, 214 n3 (NJ 1978 (interior citations omitted):

> Contrary to the suggestion made in the dissenting opinion, the State as sovereign is not 'liable' for the payment of claims for victim compensation benefits in the sense that term is normally used. As we have observed . . ., there is no 'right' to victim compensation benefits. Moreover, under the sui generis scheme of the Criminal Injuries Compensation Act, the Board is 'liable' for the payment of victim compensation benefits only to the extent of its funding by the Legislature; there is no 'excess' liability on the part of the public treasury for valid claims which cannot be paid because of insufficient funding.

See also *Gryzuec v Zweibel,* 426 NYS 2d 616, 618 (NY App Div 4 Dept 1980).

115. Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime,* 10 St Louis U L J 238, 241 (1965).

116. According to Edelhertz and Geis, who cite to the New York Meeting of the Governor's Committee on the Compensation of Victims of Crime, held on Jan 14, 1966 at 141, Gerhard O. W. Mueller, a Professor of Law at New York University School of Law, suggested that the proposed legislation might promote crime by reducing a criminal's "inner hurdle" against victimizing someone by allowing him to rationalize that "nobody got hurt." Edelhertz and Geis at 29 n.33 (cited in note 102). Mueller analogized to crimes against property, in which robbers were

jected because crime victims were not their first choice of worthy unfortunates. In New York State one of the first speakers at the legislative hearings held to discuss the proposed legislation was a former Assistant District Attorney, Richard Kuh. Mr. Kuh worried that payments to crime victims would quickly soar and that the costs of managing a compensation program would be unmanageable. He believed that society could find better ways to spend the money—even within the criminal justice system. He argued that the public ought to be spending on additional police and better methods of drug treatment and rehabilitation.[117]

Neither of these arguments slowed passage of the legislation. Instead, the bills were carefully drafted to respond to those concerns. Thus, many states require means testing, a minimum loss, and cooperation with law enforcement in order to obtain financial assistance. Additionally, all programs have laws or procedures designed to exclude non-innocent victims from receiving compensation.[118] Sixteen states reported to the NIJ that they deny awards completely if claimants are found to have engaged in contributory misconduct. More often, states reported reducing awards in proportion to the extent of contributory misconduct.[119]

Financial objections do not seem to have been a genuine obstacle. The most recent survey of crime victims compensation programs conducted by the U. S. Department of Justice reports that in their most recent year of operation, programs responding to the survey, paid over $125 million in benefits. Administrative costs averaged about 16 percent of total costs.[120]

The success of the campaign for crime victims' compensation statutes teaches many lessons for advocates of indemnification legislation for the unjustly convicted. First, the legislation does not need to be supported by a "legal" obligation, nor does it need to further a collateral criminal justice goal—like reducing crime or encouraging better citizen/police relationships.[121] Crime victims' legislation wasn't enacted because crime victims had a legal right to compensation, or even because it was useful. The legislation was enacted because it seemed morally right to a public scared of crime and frightened of being victimized.

Second, while cost projections should not deter passage of the legislation, any indemnification system must include provisions to ensure that only the truly

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reported to have considerably less reluctance to hold up finance companies and large insured corporations than to rob private citizens. Mueller also stressed that the psychological relationship between the criminal and his victim often is too close and intricate for a statute to discriminate categorically between one and another. "The vast majority of homicides and rapes are victim-precipitated," Mueller told the committee, adding that the homicide victim's role in courting death could range from an outright dare to a subliminal invitation. Id at 29.

117. Id at 28.

118. See generally, *Compensating Crime Victims*, at 23 (cited in note 98).

119. A typical example of the non-innocent victim is the loser of a barroom fight, where both individuals have been drinking, and where an investigator has difficulty ascertaining the primary aggressor, id at 23.

120. Id at 36.

121. The existence of a remedy might have a deterrent effect on police or prosecutorial misconduct, but the justification for the remedy does not depend on whether or not it effectively deters.

innocent recover. Finally, the legislation needs an advocate and a story. The legislation will be more attractive if introduced in the context of a highly publicized miscarriage of justice, so that the public can identify with the individual who has been wrongfully accused.

Passage of indemnification legislation would create for all what already exists for some—an accessible, reliable and swift remedy triggered by the status of the claimant and the harm endured, rather than the negligence or wrongdoing of the individuals, or municipalities which inflicted the injury.

IV. AN ANALYSIS OF EXISTING INDEMNIFICATION STATUTES

Despite the need for indemnification legislation and the persistent call to enact it, existing indemnification statutes are surprisingly underutilized. The reasons are fairly obvious: Some statutes require an unjustly convicted person to first win a full pardon on the grounds of innocence in order to bring a claim. Others limit damage awards to such an extent that claim filing seems pointless.

With fifteen different statutes in existence—some for as long as fifty years[122]—it is possible to compare the states' experience with indemnification legislation and reach some conclusions about which formulas are the most successful.

A. CLAIM FILING REQUIREMENTS (CONDITIONS PRECEDENT)

All indemnification statutes are designed to satisfy two conflicting purposes: ensuring that the truly innocent are compensated while simultaneously limiting the proliferation of non-meritorious claims. The challenge for lawmakers is to write a statute that focuses on the assertion of innocence, eliminates from consideration those judgments which were reversed or vacated on grounds having little to do with innocence (such as the suppression on constitutional grounds of potentially incriminating evidence, or the deprivation of the right to a speedy trial), and limits the necessity for judicial reevaluation of evidence produced at the trial or hearing.[123]

To balance these competing interests, indemnification legislation incorporates pleading requirements to screen potential claims. All statutes require claimants, for example, to establish in pleadings that they were convicted of a crime (generally that crime must have been a felony), and that they were sentenced and

122. The oldest statutes are California's (1941), Wisconsin's (1943), Illinois' (1945), and North Carolina's (1947). See note 1.

123. This was the task that the Law Review Commission in New York set out for itself when it considered indemnification legislation. Law Revision Commission, at 2928-2929 (cited in note 95).

served time in prison as a result.[124] In addition, every statute requires claimants to set forth prima facie proof of innocence so that the court or administrative body reviewing the claim can determine from the papers whether there is a likelihood of success. In some states that proof can only be a pardon on the ground of innocence.

Other states permit claimants to show, for example, that charges were dismissed by the prosecuting authority for reasons consistent with innocence or that the case was tried to an acquittal, after a reversal on grounds consistent with innocence.

Experience shows that the pardon requirement can be an insurmountable barrier to recovery for deserving claimants because executive clemency is entirely discretionary.[125] No one has a right to a pardon.[126] A person may have been completely exonerated and nonetheless unable to obtain a pardon. Eligibility for a pardon does not guarantee delivery. In fact, the grant of a pardon depends primarily on whether the governor thinks that the voting constituency will approve the decision. Some governors seem to take pride in refusing to grant pardons.[127] Others will only grant pardons on certain grounds.[128] Thus, statutes which require pardons are likely to be self-defeating. A pardon requirement will prevent an undeserving person from obtaining an award but will do little to assist one who is truly innocent but is unable to rally support with the governor.

A quick look at Illinois' experience with its indemnification statute proves how political a pardon requirement can be. The Illinois statute—which requires a pardon for innocence—was enacted in 1945.[129] For fifty years, until 1995, there were only two successful indemnification claims in the state, despite the occurrence of many wrongful convictions there. [130] In 1997 and 1998, however, the

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124. In other words, individuals who have been wrongfully convicted, but were sentenced only to probation or to some other sanction less serious than a prison term, do not have a cause of action.

125. See, for example, *Rich v Chamberlain*, 62 NW 584 (Mich 1895); *Montgomery v Cleveland*, 98 So 111 (Miss 1923); *Ex parte Horine*, 148 P 825 (Okla Crim Ct 1915).

126. See, for example, *Roberts v State of New York*, 54 NE 678 (NY 1899).

127. In September 1997, Governor George W. Bush of Texas, who has denied more than 400 pardons recommended by the Texas Board of Pardons and Paroles, likewise declined to grant a pardon to a Houston man who spent 12 years in prison for a rape that DNA testing later indicated he did not commit. Sam Howe Verhovek, *Convicted Rapist Denied Pardon Despite DNA Test*, Austin American-Statesman, Sunday (9/14/97), 1997 WL 2839020. Gov. Bush finally relented after a blitz of media stories. Mike Kelley, *DNA Leads Governor To Pardon Austinite* (11/21/97), 1997 WL 284 7366.

128. Governor James Thompson of Illinois refused to grant pardons on the ground of innocence. Telephone Interview with Chad Fornoff, Counsel to the Illinois Court of Claims (Sept 11, 1998).

129. The Illinois statute was amended in 1997 to increase awards, but the pardon requirement was not eliminated. See Ill Rev Stat ch 705 § 505/8.

130. NIJ, *Report* at 34-76 (cited in note 6). Five of the twenty-eight cases described in the NIJ report, for example, were Illinois cases. For example, Ronnie Bullock was convicted of raping a nine-year-old girl in Chicago in 1984. He was sentenced to serve 60 years in jail. He served 10½ years of his sentence before DNA testing established that he could not have been the perpetrator. Rolando Cruz and Alejandro Hernandez were convicted, again in Chicago, of raping and

political climate changed and seven men were indemnified using the Illinois statute. The explanation for the difference is, in part, a change in administration. Governor James Thompson, who was voted out of office in 1990, refused to pardon anyone for innocence. His successor, Jim Edgar, has taken a different position and will grant pardons to the unjustly convicted.[131]

Even when pardons are obtainable, the requirement can have unanticipated and arbitrary results. Willie Gilbert was convicted of murder in 1953 and sentenced to serve ninety-nine years in Texas. The conviction was affirmed and Mr. Gilbert filed a petition for a writ of habeas corpus. The District Court granted him relief and ordered a new trial. Fourteen years after the original trial, the charges were dismissed for lack of evidence. Mr. Gilbert filed a claim for compensation under the Texas indemnification statute but the court refused to grant relief holding that the claimant had forfeited his chances at indemnification by selecting to file a writ in federal court rather than appealing to the governor for a pardon.[132] Five years later, Arnold Ashford's claim for compensation in Texas was likewise rejected. Mr. Ashford had been wrongly convicted of theft and subsequently granted a full pardon by the Governor in 1997. The State of Texas successfully argued that by the time the pardon was granted the criminal charges had already been dismissed and "there was nothing to pardon."[133]

On the other hand, a few states have recognized the types of unjust results a pardon requirement can produce. In 1996, for example, New Hampshire amended its indemnification statute to eliminate the pardon requirement[134] which, according to the New Hampshire Attorney General's office, had prevented an otherwise worthy claimant from recovering.[135]

There is no justifiable reason to condition relief upon the acquisition of a pardon. Careful drafting can accomplish the same goal—ensuring that only the innocent recover. Ten jurisdictions have drafted legislation in which indemnification does not depend upon a pardon. Of those, the District of Columbia, Ohio, New Jersey and West Virginia permit claimants to prove either that they have been pardoned or that their conviction was vacated, and the indictment either

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killing a ten year-old girl. They each served 11 years before the charges against them were dismissed. Gary Dotson served 8 years for a rape that the complainant eventually admitted to having fabricated to hide a sexual encounter with her boyfriend. Steve Linscott was convicted in Cook County of a murder and sexual assault in 1980. He served 3 years and was free on bond for an additional 7 before the charges were dropped as a result of DNA analysis. Id at 39-65

131. Telephone Interview with Chad Fornoff, Counsel to the Illinois Court of Claims (Sept 11, 1998). Part of the explanation for the recent increase in successful claims is the 1977 amendment increasing the potential award.

132. Gilbert v State of Texas, 437 SW 2d 444 (Tex 14th Dist Civ App 1969).

133. Ashford v State of Texas, 515 SW 2d 758, 759 (Tex-Waco Civ App 1974). (Texas also claimed that Mr. Ashford did not spend any time in jail as a result of the wrongful conviction, but that argument did not convince the appellate court to affirm the dismissal of Ashford's claim.)

134. See NH Rev Stat Ann § 541-B:14.

135. Telephone Interview with Steven Judge, Esq., Assistant Attorney General for the State of New Hampshire, (July 30, 1998).

dismissed on a ground consistent with innocence or tried to an acquittal.[136] Iowa permits a claimant to bring a claim if the conviction has been vacated, dismissed or reversed for any reason so long as no further proceedings can or will be held.[137] Tennessee requires proof of "exoneration or unconditional pardon due to innocence."[138] California permits proof of either a pardon or proof of innocence.[139] The Federal statute requires a pardon or a court issued "certificate of innocence."[140] Wisconsin's statute has no conditions precedent and asks simply for proof of innocence.[141]

The New York statute[142] requires claimants to establish in pleadings that: The conviction was reversed or vacated and that the accusatory instrument was dismissed; or if a new trial was ordered, they were either found not guilty or were not retried and the accusatory instrument was dismissed. To ensure that the charges were dismissed on a ground consistent with innocence, a claimant must further establish that the reversal or vacation of the conviction, and the dismissal of the accusatory instrument, were made on one or more specific Criminal Procedure Law grounds.[143] Finally, the statute asks claimants to establish in pleadings a substantial likelihood of prevailing at trial. In summary, it gives appropriate deference to prior court decisions—rather than a prior executive determination—while ensuring litigation of only claims based on innocence.

Because the New York State statute has been tested more frequently than any other, there is a wealth of judicial experience applying it. The decisions illustrate that the New York Court of Claims has had no difficulty distinguishing—on the pleadings—between those petitions appropriate for determination on the merits and those which fail to state a claim.[144] Although a pardon requirement would

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136. See Appendix for complete information.

137. See Iowa Code Ann § 663A.1 (1997).

138. See Tenn Code Ann § 9-8-108(a)(7)(1955).

139. See Cal Penal Code §§ 4900-4906 (1941).

140. See 28 USC §§ 1495, 2513 (1948).

141. See Wis Stat § 775.05 (1943).

142. See New York Court of Claims Act § 8-b.

143. Unfortunately, the statute does not include all of the possible grounds—consistent with innocence—upon which a case in New York may be dismissed. New York has a catch-all clause which permits a case to be dismissed "in furtherance of justice," NY Crim Proc Law § 210.40. Although "in furtherance of justice" sounds consistent with innocence, since that clause wasn't specifically included as a permissible ground in § 8-b, a claimant whose indictment is dismissed for that reason will not be able to meet the conditions precedent for bringing a claim—even if innocent.

144. See, for example, in *Forest v State of New York*, 541 NYS 2d 213 (NY App Div 1st Dept 1989), where claimant Forest had been convicted of several robberies. The conviction was reversed because the trial court erred in its charge and by permitting the introduction of certain identification testimony. Subsequently the prosecutor declined to retry the case in deference to the victims who did not wish to testify again and because, even were the claimant to have been reconvicted, he would have already served any possible re-sentence. The Court of Claims had no trouble determining that the claim did not meet the statutory pleading requirements. See also, *Fudger v State of New York*, 520 NYS 2d 950 (NY App Div 3d Dept 1987), holding that a claim based on a double jeopardy did not come within the scope of the indemnification statute; *Heiss v State of New York*, 531 NYS 2d 320 (NY App Div 2d Dept 1988), where a claim was

make the decision simpler, that slight advantage to the Court is far outweighed by the arbitrary and political effect the pardon requirement has on potential claimants.

Pardon requirements should be eliminated where they still exist. New indemnification statutes should model their language on those statutes that provide an alternative to requiring a grant of executive clemency. Careful drafting can easily accomplish what a pardon requirement is intended to achieve, without adding inappropriate and unnecessary barriers to recovery.

B. LIMITATIONS ON AWARDS

Many states severely and unnecessarily limit the amount of recoverable damages. The unreasonable limitations discourage claim filings. California, for example, permits no award greater than $10,000,[145] and despite evidence that thirty-one individuals have been wrongly convicted in that state,[146] it appears that only one wrongly convicted individual has successfully used California's indemnification statute.[147]

Wisconsin, which limits awards to $5,000 per year or $25,000 in total—inclusive of costs, attorney fees and disbursements—reports that in the statute's fifty-five year history there have been only two successful claims,[148] although researchers have documented five wrongful convictions in that state.[149] In West Virginia, which limits awards to a maximum of $50,000, the Court of Claims has made only two awards.[150] Texas, the site of many unjust prosecutions and con-

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dismissed because the claimant's conviction for selling narcotics had been reversed for erroneous evidentiary rulings and one of the undercover officer's had testified at the trial that the claimant had been found with $2,500 in marked money at the time of his arrest—facts inconsistent with innocence; *Stewart v State of New York*, 518 NYS 2d 648 (NY App Div 2d Dept 1987), where charges were dismissed for prosecutorial misconduct but no proof of innocence was contained in the pleadings; *Lluveras v State of New York*, 518 NYS 2d 548 (NY Ct Cl 1987), where the claimant's conviction was reversed due to the admission in evidence of a coerced confession, but where no evidence of innocence was alleged; and *Pough v State of New York*, 582 NYS 2d 590 (NY Ct Cl 1992), where the claimant's charges were eventually dismissed because he had served the maximum sentence that could have been imposed on him after a subsequent trial. In the one case that reached New York's highest court, the Court of Appeals, while not spelling out the facts in great detail, held that an acquittal after trial is not the equivalent of innocence and that a claim can not proceed without additional proof of innocence, *Reed v State of New York*, 574 NE 2d 433 (NY Ct App 1991).

145. See Cal Penal Code §§ 4900-4906.

146. See *In Spite of Innocence*, at 359-360 (cited in note 4).

147. In 1967 Victor Ciancanelli received $5,000 for five years of imprisonment, *Ciancanellia v Cal State Board of Control*, 248 Cal App 2d 705 (Cal App 3d Dist 1967).

148. Memorandum from Patricia A. Reardon, Program Assistant at the State of Wisconsin Claims Board (July 29, 1993) (on file with the author).

149. See *In Spite of Innocence*, at 359-360 (cited in note 4).

150. *William C. Edens, Jr. v State of West Virginia*, (CC-87-218, opinion issued Nov 23, 1988); and *Harry Lee Clayton v State of West Virginia* (CC-89-235, opinion issued Oct 1989).

viction but fewer exonerations,[151] reports that only a single claim has been paid under its statute.[152]

States may have limited awards out of fear that the sheer number of claims would strain state budgets. This concern is unfounded. The number of wrongful convictions occurring in any state is simply not great enough to warrant these restrictions. Once again New York's experience is useful. New York's indemnification statute does not limit damages. Between January 1, 1994 and March 31, 1998, forty-seven wrongful conviction claims were filed with the Court of Claims. The Court made an award in three cases. Six others were settled. The remainder were dismissed. The total amount awarded to claimants was $2,815,750[153]—an amount which appropriately corresponds to the expected number of wrongful convictions in a heavily populated state with a large criminal justice system, but which is hardly budget-breaking.[154]

Although placing a dollar amount on the loss of liberty inevitably seems arbitrary, measuring damages in wrongful conviction cases has proved no more difficult in any other category of personal injury case. Freedom is valuable and its loss can be measured, if imperfectly, and compensated.

> The claimant has been humiliated, degraded, shamed and suffered a loss of reputation and earnings. For this he must be paid, and for this money damages can be compensatory. But all the wealth of the State of New York could not compensate the claimant for the mental anguish suffered through nearly twelve

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151. Only one of the 28 exonerations documented in the NIJ report occurred in Texas, although many men have been unjustly convicted in that state. See, for example, Bob Herbert, Editorial, *The Wrong Man,* NY Times (7/25/97) at A29, 1997 WL 17848288 recounting the story of David Wayne Spence's execution on Apr 3, 1997 for a triple homicide of which he was "almost certainly innocent." See also *In Spite of Innocence*, at 359-360 (cited in note 4) (documenting ten wrongful convictions in Texas, prior to the Spence case).

152. Texas caps at $50,000. Tex Code Ann § 103.001. In 1969 Mr. Vargas received an award of $20,000 for physical and mental pain and suffering. Mr. Vargas had been sentenced to death. His head was shaved; he was given his last meal; and he was shown the coffin in which he was to be buried. Four hours before the scheduled electrocution, a stay was issued and he was subsequently granted a full pardon. See *State v Vargas*, 424 SW 2d 416 (Tex 1968).

153. See report from the Chief Clerk of the New York Court of Claims (dated Apr 27, 1998) (on file with the author).

154. The absence of adequate remedy at law for the unjustly convicted is especially incongruous when contrasted with the relatively easy availability of recourse for individuals who have been injured in other—and often much less serious ways—during the investigatory phase of the criminal justice system. Police officers, and police departments, as well as the municipalities and governments who employ and train them, are sued successfully and frequently for mistakes in judgement, for negligent or reckless behavior, and for the use of excessive force. "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed . . ." *Owen v City of Independence*, 445 US 622, 651-52 (1980). A verdict search in New York State reveals that from 1992-1997 there were approximately sixty plaintiffs' verdicts (distinct from settlements) in suits against various state, city and local police forces for false arrest and malicious prosecution alone. These awards, which do not include awards for assault or other types of intentional police misconduct, totaled over $11 million.

> years of false imprisonment, under the impression that he would be there for the rest of his life. How can a man be repaid who has been branded a murderer and whose only hope is an early death to release him from the sentence erroneously passed on him? For this, any award is bound to be a mere token, but it should compensate as well as the medium allows.[155]

In *Robert McLaughlin v State of New York*,[156] the Court of Claims was required to evaluate six and one-half years of a young man's life. In considering non-pecuniary losses, the Court held:

> At the outset, we find that claimant has undoubtedly suffered a loss of reputation. Although he had two minor scrapes with the law they are really of little consequence when compare with a stigma of a murder conviction. Surely, people will wonder? Surely, individuals will always question? Surely, the grief will always be pain to see? It is fairly simple to award damages for physical injury. The injury is visible, the likelihood of recovery predictable. Here, the injury is not just a physical ailment, although there are elements that are. Here the Court is called upon to determine the value of freedom as to this individual claimant. In effect, we are asked to place ourselves within the experience of the claimant in his enduring quest for freedom. . . . How does one place a monetary value on seemingly mundane things like sleeping in one's own bed; a stroll through a park or a hug form a loved one. Yet, those are among the very things one longs for, and which are denied to a person in prison.[157]

Ultimately, Justice Orlando awarded $1.5 million for the loss of liberty, mental stress anguish and reputation.

Parsimonious monetary limits dissuade counsel from pursuing wrongful conviction claims on behalf of exonerated individuals, and discourage counsel from assisting those who are still in prison and able to present a reasonable claim of innocence which requires development.[158] Having been convicted, most often by a jury verdict then affirmed by appellate courts, wrongly convicted individuals have understandable difficulty convincing anyone to look at their claims. The possibility of an award might interest counsel to assist with the necessary investigation.

For those who have been vindicated, indemnification claims are not conducive to pro se litigation. Claimants need help drafting claims to withstand motions to dismiss for failure to state a claim. Conditions precedent must be met and plead in the moving papers and the likelihood of prevailing at a trial must be established. Larger awards, and provision for attorney's fees, will not only ensure

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155. *Hoffner v State of New York*, 142 NYS 2d 630 (NY Ct Cl 1955).

156. Court of Claims No. 75123 Decision filed Oct 16, 1989.

157. Id at 12-13.

158. The Innocence Project, which represents convicted people across the county, has a current docket of 250 individuals whose cases have been screened and are in the midst of active investigation. A thousand other cases have been preliminarily accepted but are not yet being investigated. Every Innocence Project client has failed to interest other counsel in his case. Meanwhile the Project has declined to help thousands of others who may be innocent but whose claims can not be proven by serological comparison. (Conversation with Peter Neufeld, co-director of the Innocence Project, Oct 11, 1998.)

that the wrongly convicted are adequately and fairly compensated for their loss, but will ensure that claimants can find counsel to assist them to pursue indemnification.

C. BURDENS OF PROOF

In some states the existence of a pardon is sufficient to establish state liability. In most, however, once pleading requirements have been met, claimants must then prove innocence at a hearing—either by clear and convincing evidence or by a preponderance of evidence. It might be expected that only DNA exclusion cases could meet the clear and convincing standard, and that such a high standard would needlessly thwart meritorious claims. That has proved not to be true.

In New York, where proof must be proved by clear and convincing evidence, Arthur Cleveland (to take just one example) was able to establish his innocence of a murder simply by testifying that he had been in another state at the time of the crime and by discrediting the credibility of the prosecution's alleged eyewitness—whose testimony was the only evidence linking him to the crime—with information about her character that had not been available to the defense at the first trial.[159] Ordinary testimony was sufficient to meet the burden. In fact, although many claims (in New York and elsewhere) have been dismissed for failure to meet pleading requirements or to establish innocence, I have not found a single case where that determination was affected by the burden of proof or where the burden was even discussed as claim determinative.[160] Thus, new indemnification statutes should consider incorporating the clear and convincing standard since it neither deters claim filing nor impedes judges from making awards, and may be reassuring to lawmakers and the general public.

D. ABSENCE OF BEHAVIOR CONTRIBUTING TO CONVICTION

The vast majority of states require claimants to affirmatively prove they did nothing that might have contributed to their initial unjust conviction—such as pleading guilty or testifying falsely at their trial. Although this requirement has created some collateral litigation,[161] it is both reasonable and practicable.[162] Stat-

159. *Arthur Cleveland v State of New York*, Court of Claims Claim No. 74204, decided Apr 22, 1992.

160. This may in part be due to the fact that claims against states are generally decided by judges, not juries.

161. For example, in the Coakley appeal, noted above in Section II of this article, the New York State Attorney General unsuccessfully argued (among other things) that because Mr. Coakley's defense attorney failed to convince the court to admit the exculpatory serological evidence, Mr. Coakley's claim was precluded due to ineffective assistance of counsel attributable to the defendant.

162. In New York, claims have been disallowed where the claimant offered a false alibi at his trial, *Moses v State of New York*, 523 NYS 2d 761 (NY Ct Cl 1987); and where the claimant's willingness to work with unlicensed handgun within reach contributed to conviction for illegal possession, *Alexandre v State of New York*, NYLJ, at 24 (3/31/89), col. 1, aff'd on other grounds,

utes should be carefully drafted, however, so as not to preclude a claimant, who was coerced into falsely confessing or who entered an Alford plea,[163] from filing a claim.

E. FORUM OF ADJUDICATION

In New York a claim for unjust conviction is brought directly in the Court of Claims. In other states, claims are routed through civil court. In California, Maryland, and Wisconsin a claimant must file a petition before an administrative board. In North Carolina, the Industrial Board makes an initial determination of liability and then the claim is sent to the Court of Claims for a damage determination. For states considering the question, there will be an insufficient number of cases filed in any year in any state to merit the creation of an administrative board or agency to determine wrongful conviction cases. Existing forums can handle the additional matters expeditiously. Furthermore the legal issues arising are neither so technical nor so unique as to justify creation of a specialized agency.

F. TIME LIMITS

All indemnification statutes have standard and reasonable two year statutes of limitation, except for California which requires claims to be filed within six months from the triggering event: acquisition of a pardon, acquittal or dismissal of the charges. Six months is too short.

G. RETROACTIVITY

Most indemnification statutes include a clause permitting all outstanding claims in existence to be filed within a certain time from the operative date of the statute.

H. CLAIM PRECLUSION

The New Jersey and New York wrongful conviction statutes include preambles specifying that the creation of an indemnification remedy was intended to

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563 N.Y.S. 2d 635, appeal dismissed 77 NY 2d 925, 569 NYS 2d 603, 572 NE 2d 44 (1991). The Third Appellate Department, however, rejected the argument that the claimant's failure to testify at trial contributed to his conviction. See *Lanza v State of New York*, 515 NYS 2d 928 (NY App Div 3d Dept 1987).

163. An Alford plea, which takes its name from *North Carolina v Alford*, 400 US 25 (1970), is a plea of guilty in which accused does not admit guilt but offers to plead to avoid the possibility of the much more severe sentence that would be imposed after trial. As mentioned earlier, the NIJ report contains one case where an innocent man entered an Alford plea to avoid the death penalty. See note 31.

supplement not supplant already existing tort remedies.[164] Although this language ought to be superfluous since acceptance of an indemnification award should not bar subsequent lawsuits, especially when so many of the indemnification awards drastically limit damages, it should be included in all new statutes. Acceptance of an indemnification award should not be construed as a waiver or release of the state from any further potential tort or civil rights claims. If such suit were successful, the amount awarded as indemnification could be deducted from damages so as to prevent a double recovery.

V. CONCLUSION

David Shepard was released from a New Jersey prison in April 1995, after serving almost eleven years for a crime the courts now agree he did not commit. At the time of his arrest, David Shepard was nineteen years old and the father of a five-month-old baby boy. He had never been arrested before.

Like Mr. Coakley, Mr. Honaker, and many others, Mr. Shepard was misidentified by a rape victim. A jury believed the victim's testimony over Shepard's alibi evidence. He was convicted and sent to prison. Mr. Shepard persistently professed his innocence and "started reading prison library books about DNA evidence. In 1992 he sought to have DNA evidence used to prove his innocence."[165] Fortunately the original semen samples taken from the rape victim had been preserved and post-conviction DNA testing established that he was not the rapist.[166] A new trial was ordered on the basis of the DNA test results and eventually the prosecution declined to re-try the case.[167]

After his release, David Shepard explored the possibility of filing a lawsuit seeking damages for the years he had spent in prison. He contacted Paul Casteleiro, Esq., an attorney experienced in litigating damage claims on behalf of individuals who had been maliciously prosecuted and unjustly arrested.[168] Mr. Casteleiro analyzed the case from top to bottom and had bad news for Mr. Shepard. There was no one to sue. Just as in Mr. Coakley's case, Mr. Shepard was convicted because the victim was wrong. The police were justified in relying on the identification. The prosecuting attorneys were required to indict, and the jury was entitled to believe the victim and convict. The fact that they were all wrong didn't establish anyone's liability under the law.

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164. See NJ Stat Ann 52:4C-1 which reads "The legislature finds and declares that innocent persons who have been convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress and that such persons should have an available avenue of redress over and above the existing remedies to seek compensation for damages." See also NY Ct Cl § 8-b.

165. Dana Coleman, *Man Seeks State Compensation After 11 Years in Prison*, New Jersey Lawyer (12/4/95).

166. NIJ Report, at 70-71 (cited in note 6).

167. Id.

168. Telephone Interview with Attorney Paul Casteleiro, July 1997.

For three years it looked as though Mr. Shepard would be unable to collect a dime in compensation. Not only did New Jersey lack a wrongful conviction statute, but New Jersey state courts historically interpreted their state constitution as prohibiting the passage of a special "moral obligation" bill.[169]

In response to the inequities in New Jersey's law, Mr. Casteleiro proceeded to draft an indemnification statute so that Mr. Shepard and others like him would not be left without recourse. He sent the draft to the office of every state legislator in New Jersey, along with a newspaper article describing Mr. Shepard's experience. The story convinced New Jersey State Senators Rice and Cardinale to sponsor a bill which was signed into law by Governor Whitman during July of 1997.[170] The entire process from bill drafting to the governor's signature took only eighteen months. The law permits "mistakenly" convicted individuals to collect $20,000 a year for each year spent in jail.[171]

Mr. Casteleiro's success can be duplicated in each state without indemnification legislation. Moreover, it is not necessary to wait until someone is wrongly convicted. States can be persuaded to enact legislation prophylactically just as victims' compensation statutes were eagerly enacted on the strength of a single incident. All that is needed is a dedicated spokesperson or organization. There are plenty of sympathetic stories to tell.[172]

While Borchard may have had difficulty convincing a skeptical public in 1932 to indemnify the wrongfully convicted, it was probably equally difficult to convince the public, at that time, that completely innocent people were convicted. Americans like to pretend that our criminal justice system, with its many procedural safeguards for the accused, embodies the maxim that "it is far worse to convict an innocent man than to let a guilty man go free."[173] As late as 1988, disbelieving critics disputed Radelet and Bedau's descriptions of miscarriages of justice in homicide cases by challenging the facts and claiming bias and exaggeration.[174]

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169. "The Legislature shall not pass any private, special or local laws." NJ Const art IV, § 7, para 9.

170. NJ Stat Ann §§ 52:4C-1 - 4C-6.

171. The law was enacted and entitled "New Jersey's Compensation for Persons Mistakenly Imprisoned", NJ Stat Ann §§ 52:4C-1 - 4C-6 (effective Aug 25, 1997).

172. Ohio's indemnification statute, Ohio Rev Code Ann § 2305.02, § 2743.48, was enacted in direct response to Mr. Leonard O'Neil's case. Mr. O'Neil was convicted of a robbery he did not commit and spend three and one-half years in jail before someone else confessed to the crime and he was released. The Ohio General Assembly enacted special legislation permitting his claim against the state to proceed but the Court of Claims awarded him only $6,967. O'Neil appealed and the Ohio Court of Appeals, at *O'Neil v State*, 469 NE 2d 1010 (Ohio App 10 Dist 1984), set aside the award as grossly inadequate. Two years later Ohio passed its indemnification statue—which has been used successfully more than most. See generally, *Cox v State*, 552 NE 2d 970 (Ohio Ct 1988); *Chandler v State*, 641 NE 2d 1382 (Ohio App 8 Dist 1984); and *Fay v State*, 610 NE 2d 622 (Ohio Ct Cl 1988).

173. *In re Winship*, 397 US 358, at 372 (1970), collected in William S. Laufer, *The Rhetoric of Innocence*, 70 Wash L Rev 329 (1995).

174. Markman and Cassell, 41 Stan L Rev 121 (cited in note 5).

Today, advances in the forensic sciences prove to a moral certainty that despite our highly technical rules, the adversary process, a multi-tiered appellate process and publicly funded defense counsel, innocent people are convicted. We can no longer seriously contend that the criminal justice system convicts only the guilty or always lets the innocent go free. However unpleasant that knowledge might be, it compels action.

As Borchard stated the case:

> Whatever the most convincing theory, compensation responds to an elementary demand for justice harbored in every human breast. Just as that demand is satisfied by the conviction of the guilty, so it required acquittal of the innocent. When, then, by a misguided or mistaken operation of the governmental machine there is a miscarriage of justice and the helpless innocent is actually convicted, the public conscience is and ought to be revolted and dismayed. The least the community can do to repair the irreparable is to appease the public conscience by making such restitution as it can by indemnity.[175]

175. See *Convicting the Innocent*, at 392 (cited in note 4).